

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





# TRANSCRIPT OF RECORD

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UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA

JANUARY TERM, 1937

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No. 6937

139

SPECIAL CALENDAR

JAMES BOSTIC, APPELLANT

VS.

UNITED STATES OF AMERICA

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF COLUMBIA

---

Filed March 24, 1937





UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA

APRIL TERM, 1937

No. 6937

JAMES BOSTIC, APPELLANT

vs.

UNITED STATES, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF COLUMBIA

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A In the District Court of the United States for the District of  
Columbia

United States Court of Appeals for the District of Columbia.  
Filed Mar. 24, 1937. Moncure Burke, Clerk.

Criminal No. 58600

UNITED STATES OF AMERICA

vs.

JAMES BOSTIC

*Notice of Appeal*

James Bostic (name and address of appellant).

Joseph Sitnick, 635 F Street NW. (name and address of appellant's attorney).

Offense: Murder in the first degree.

Date of judgment: March 19, 1937.

Brief description of judgment or sentence: Sentenced to electrocution on May 14, 1937.

Name of prison where now confined, if not on bail: Washington Asylum and Jail (District Jail).

I, the above-named appellant, hereby appeal to the Court of Appeals of the District of Columbia from the judgment above-mentioned on the grounds set forth below.

JAMES BOSTIC,  
*Appellant.*

JOSEPH SITNICK,  
*Attorney for Appellant.*

Date MARCH 22, 1937.

GROUND OF APPEAL

1. That the Court erroneously refused to direct a verdict of not guilty as to murder in the first degree.

2. That the verdict was contrary to law.

3. That the Court erred in refusing to grant defendant's motion for a new trial.

4. For reasons contained in defendant's motion for a new trial.

5. And for other reasons that will be called to the attention of the Court at the hearing of this appeal.

B In the District Court of the United States for the District of  
Columbia

Clerk's statement of docket entries to accompany duplicate notice of appeal to the Court of Appeals.

United States Court of Appeals for the District of Columbia.  
Filed Mar. 24, 1937. Moncure Burke, Clerk.



Criminal No. 58600. First Degree Murder

UNITED STATES OF AMERICA

vs.

JAMES BOSTIC

DATE

1936

Nov. 12—Presentment and indictment filed.

Nov. 13—Arraigned, Plea Not Guilty. Indictment read.

1937

Feb. 8—Jury sworn and respited until tomorrow. Deft's prayers filed.

Feb. 9—Trial resumed, same jury; Verdict guilty of Murder in the First Degree. Defendant remanded.

Feb. 9—Motion for a new trial filed.

Mar. 19—Motion for a new trial argued and overruled. Exception.

Mar. 19—Sentenced to death by electrocution, to take effect May 14, 1937.

Mar. 24—Notice of Appeal filed.

Mar. 24—Petition to proceed in forma pauperis and affidavit in support thereof filed.

Date MARCH 24, 1937.

Attest:

[SEAL]

CHARLES E. STEWART, *Clerk.*

By SAMUEL SILVERMAN,

*Assistant Clerk.*

NOTE.—This statement from the docket entries is intended suitably to identify the case and not as a substitute for the record on appeal, which is to be prepared and certified as provided in Rules 7, 8, and 9 of Supreme Court U. S.

C In the District Court of the United States For the District of Columbia

Holding A Criminal Term

No. 58,600

UNITED STATES OF AMERICA

vs.

JAMES BOSTIC

*Petition to proceed in forma pauperis*

Comes now James Bostic, the petitioner, by his attorney, Joseph Sitnick, and represents to this Honorable Court that he is without funds as attested by the accompanying affidavit and begs that he be permitted to perfect his appeal without the prepayment of costs or

the giving of security therefor, and that he be allowed to proceed in forma pauperis.

(Signed) JAMES BOSTIC,  
*Petitioner.*

Subscribed and sworn to before me this 22nd day of March 1937.

[SEAL]

(Signed) RICHARD H. WOODWARD,  
*Notary Public, D. C.*

In consideration of the foregoing petition and accompanying affidavit, it is Ordered that the petitioner may proceed in Forma pauperis.

Dated March 24, 1937.

(Signed) JAMES M. PROCTOR,  
*Justice.*

D AFFIDAVIT IN SUPPORT OF PETITION TO PROCEED IN FORMA PAUPERIS

DISTRICT OF COLUMBIA, ss:

JAMES BOSTIC, being first duly sworn on oath deposes and says that because of his poverty, he is unable to pay the costs in this action and give security for the same, and believes he is entitled to the relief he seeks by way of appeal, a brief nature of the cause of action being as follows:

That on the 9th day of February, 1937, he was convicted in the District Court of the United States for the District of Columbia of murder in the first degree; that said conviction is erroneous because of certain facts set forth in the motion for a new trial and for other reasons, which the affiant begs to be considered as part of this affidavit.

Affiant therefore asks that an order be passed herein permitting him to prosecute his appeal without prepayment of costs or giving security therefor, and that the expenses of printing the record on appeal or writ or error be paid by the United States of America.

(Signed) JAMES BOSTIC.

Subscribed and sworn to before me this 22nd day of March 1937.

[SEAL]

(Signed) RICHARD L. WOODWARD,  
*Notary Public, D. C.*

E In the District Court of the United States For the District of  
Columbia

Criminal No. 58600

UNITED STATES

vs.

JAMES BOSTIC

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, That in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceeding had, in the above-entitled cause, to wit:



1 District Court of the United States for the District of  
Columbia

Holding a Criminal Term

October Term, A. D. 1936

*Indictment*

Filed in Open Court November 12, 1936

DISTRICT OF COLUMBIA, ss.:

The Grand Jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That one James Bostic, on, to wit, the ninth day of October, 1936, and at the District of Columbia aforesaid, contriving and intending to kill one William Tuckson, Junior, then and there being, feloniously, wilfully, purposely and of his deliberate and premeditated malice, did discharge and shoot off a bullet out of a pistol held in the hand of him, the said James Bostic, into the chest of the said William Tuckson, Junior, and thereby did give to the said William Tuckson, Junior, in and upon his chest, a certain mortal wound, of which he, the said William Tuckson, Junior, on, to wit, the said ninth day of October, 1936, did die.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say:

That he, the said James Bostic, in the manner and by the means aforesaid, feloniously, wilfully, purposely and of his deliberate and premeditated malice, did kill and murder the said William Tuckson, Junior; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

LESLIE C. GARNETT,  
*Attorney of the United States in  
and for the District of Columbia.*

2 (Endorsed:) Criminal No. 58600. United States vs. James  
Bostic. First Degree Murder. A True Bill: Ralph G. Wilson,  
Foreman.

*Memoranda*

November 13, 1936: Arraigned, Plea Not Guilty.

February 9, 1937: Verdict, Guilty of Murder in the First Degree.

*Motion for new trial*

Filed February 9, 1937

\* \* \* \* \*

Comes now the defendant by his attorney and moves this Honorable Court to set aside the verdict in the above-entitled cause for that:



1. The verdict was contrary to the evidence.
2. The verdict was contrary to the weight of the evidence.
3. That the Court erroneously admitted certain testimony over the objection of counsel for the defendant.
- 3 4. And for other reasons that will be called to the attention of the Court at the hearing of the above-entitled motion.

JOSEPH SITNICK,  
*Attorney for Defendant.*

Service acknowledged: Feb. 9, 1937. Roger Robb, Assistant U. S. Attorney.

District Court of the United States for the District of Columbia

Friday, March 19' A. D. 1937

The Court resumes its session pursuant to adjournment: Mr. Justice PROCTOR, presiding.

\* \* \* \* \*

Come as well the Attorney of the United States, as the defendant in proper person, in custody of the Superintendent of the Washington Asylum and Jail, and by his attorney Joseph Sitnick, Esquire; whereupon the defendant's motion for a new trial coming on to be heard, after argument by counsel, is by the Court overruled, to which action of the Court the defendant by counsel prays an exception, which is noted by the Court;

#### SENTENCE

It is considered by the Court, and the sentence of the law is that you, James Bostic, for the offense of murder in the first degree whereof you have been found guilty, be and you are hereby sentenced to the punishment of death by electrocution; and it is

Ordered that you, James Bostic, be forthwith taken to the Washington Asylum and Jail, otherwise known as the District Jail, in the District of Columbia, from whence you came, and there be kept in close confinement; and that on the 14th day of May, A. D. 1937,  
4 you be taken to the place prepared for your execution within the walls of the said Washington Asylum and Jail, and that then and there, between the hours of ten o'clock ante meridian and two o'clock post meridian, you be electrocuted by the causing to pass through your body a current of electricity of sufficient intensity to cause your death, and that the application of such current shall be continued until you are dead, and may God have mercy on your soul.

It is further Ordered that a certified copy of this sentence shall be transmitted by the Clerk of the District Court of the United States for the District of Columbia to the Superintendent of the aforesaid Washington Asylum and Jail not less than ten days prior to the time fixed in this sentence of the Court for the execution of the same.

Signed this 19th day of March, A. D. 1937.

JAMES M. PROCTOR, *Justice.*

*Memorandum*

March 24, 1937

Petition to proceed in forma pauperis and order of Justice Proctor granting same filed.



*Assignment of errors*

Filed April 14, 1937

\* \* \* \* \*

Comes now the defendant and for assignment of errors on appeal states that the Court below erred as follows:

1. That the verdict is contrary to the evidence.
2. That the verdict is contrary to the weight of the evidence.
3. That the Court erred in not directing a verdict as to first degree murder.
4. That the Court erred in admitting evidence of the defendant's conviction of simple assault.
5. That the Court erred in permitting the United States Attorney to ask defendant the purpose for which he had the gun in his possession.
6. That the Court erred in overruling the defendant's motion for a new trial.
  - a. That the verdict is contrary to the instructions of the Court.

JOSEPH SITNICK,  
*Attorney for Defendant.*

Service of a copy of the foregoing acknowledged this 14th day of April 1937.

ROGER ROBB,  
*Assistant U. S. Attorney, D. C.*

6 District Court of the United States for the District of  
Columbia

Friday, May 7, A. D. 1937

The Court resumes its session pursuant to adjournment: Mr. Justice GORDON presiding.

(By Proctor, J.) \* \* \*

Now comes here the defendant by his attorney, Joseph Sitnick, Esquire, and prays the Court to sign and make a part of the record his Proposed Bill of Exceptions taken during the trial of the case and submitted to the Court on the 14th day of April A. D. 1937, which is accordingly done.

*Designation of record*

Filed April 14, 1937

\* \* \* \* \*

The Clerk in preparing the transcript of record on appeal in the above entitled cause will include therein the following:

1. Indictment.
2. Memo. Plea of Not Guilty.
3. Memo. Verdict.
4. Motion for New Trial.
5. Sentence.
6. Assignment of errors.



7. Bill of Exceptions.

8. This Designation.

JOSEPH SITNICK,  
*Attorney for Defendant.*

Service of foregoing acknowledged this 14th day of April 1937.

ROGER ROBB,  
*Assistant United States Attorney, D. C.*

Approved:

JAMES M. PROCTOR, *Justice.*

8 District Court of the United States for the District of  
Columbia

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 7, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in the case of United States vs. James Bostic, Criminal No. 58600, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 11th day of May 1937.

[SEAL]

CHARLES E. STEWART,  
*Clerk.*

By CHAS. D. COFLIN,  
*Asst. Clerk.*

9 District Court of the United States for the District of  
Columbia

Holding a Criminal Term

United States Court of Appeals for the District of Columbia.  
Filed May 12, 1937, Moncure Burke, Clerk.

Criminal No. 58600

UNITED STATES OF AMERICA

*vs.*

JAMES BOSTIC

*Proposed bill of exceptions*

Be it remembered: That this cause came on for trial before the Honorable James M. Proctor, Associate Justice of the District Court of the United States for the District of Columbia, and a jury, on the 8th day of February, 1937, continuing to and including the 9th day of February, 1937; the United States being represented by Mr. Roger Robb, and the defendant being represented by Mr. Joseph Sitnick.



Thereupon the prospective jurors were examined on the voir dire and a jury was selected and sworn. The Assistant United States Attorney proceeded to deliver his opening address in the course of which he advised the jury that the Government would show as follows:

That on the 9th day of October 1936, defendant lived at No. 14 L Street NW.; that about 9:30 that evening defendant went down to a liquor store located at about six or eight doors down from defendant's house, to get some beer; that as defendant was going into the store he uttered a "fresh" remark at a girl, one of the witnesses; that this girl answered the remark with a rebuff and walked on, encountering a second girl and the deceased, William Tuckson, Jr., close to the store carrying a paper bag; that defendant then came out of the store and fell in behind the deceased and the two girls; that there was then some exchange of words between the defendant and deceased; that then defendant said, "Oh you think you are pretty tough?", and deceased said, "Yes; I have got the stuff to be bad with"; that then defendant paused at about 35 or 40 feet from where the deceased and the two girls had stopped and were standing, handed someone the bag he had in his hand, walked up to the deceased, uttered some remark, then shot deceased in the chest; that deceased then started running up the street and defendant fired at him again; that then deceased ran a little way more and fell; that then defendant turned to one of the girls and made some remark to her and shot at her; that the defendant then went into his house and drank the beer; that he did not sleep at his house that night, but the following morning left the District of Columbia, returning in about ten days, at which time he was arrested.

Whereupon, the United States, to maintain the issues on its part joined, produced the following:

WILLIAM TUCKSON was called as a witness on behalf of the United States and testified substantially as follows: That he was the father of the deceased, William Tuckson, Jr., and that the deceased was sixteen years of age and was in school; that he, the witness, went to the Morgue on the 10th day of October 1936 and there identified the body of the deceased to William W. Estes.

WILLIAM W. ESTES was called as a witness on behalf of the United States and testified substantially as follows: That he was Assistant Morgue Master of the District of Columbia and that the preceding witness, William Tuckson, identified the body of the deceased to him, the witness, as being the body of William Tuckson, Jr.; that witness in turn, identified the body of the deceased to Dr. Murphy.

Dr. CHRISTOPHER J. MURPHY was called as a witness on behalf of the United States and testified substantially as follows: That he is a practicing surgeon and physician and has been a Deputy Coroner for the District of Columbia for the last six years; that his duty as such Deputy Coroner is to perform autopsies at the District Morgue; that on October 10, 1936, he performed an autopsy on the body of the deceased, the body having been identified to him by the preceding witness, Mr. Estes; that autopsy showed as follows: That deceased



was a colored man about 16 years of age, weighing 179 pounds, and was 5 feet 7.5 inches in height; that he was a fat man; that there was a gunshot wound of entrance in the body, five inches below the notch where the two collar bones join with the breast bone, and 3½ inches to the left of the midline; that there were no powder marks or burns about this wound of entrance; that the bullet in passing through the body took a course from left to right backward and downward; that there was also a grazing wound three and a half inches above the wrist, on the ulnar side of the arm; that the cause of the death was a gunshot wound of the chest, injuring the heart and liver, causing profuse hemorrhage and shock; that the absence of powder marks or burns indicated that the gun was discharged at a distance greater than 18 inches from the body.

11 Dr. CAMILO A. JUSTIANINI was called as a witness on behalf of the United States and testified substantially as follows: That he is admitting physician at Freedmen's Hospital; that on October 9, 1936, at 9:50 P. M. the deceased was brought to the hospital and that he, the witness, pronounced him dead on arrival.

DOROTHY FERGUSON was called as a witness on behalf of the United States and testified substantially as follows: That she was 15 years old and lived at 107 L St. NW.; that she knew the deceased during his lifetime and had known him for about two or three years; that she saw the deceased on the evening of October 9, 1936, on the corner of North Capitol and L Street at about 9:45; that at that time she did not know the defendant and had never seen him before; that she saw the deceased standing near a liquor store located on the corner of North Capitol and L Street; that just as she was passing by this liquor store the defendant and another man were going into the store; that the defendant said to her, "Hello baby", and that she told him to go to H—, and that then she walked to where the deceased was standing and joined the deceased and Annabelle Lanham, who was with him; that the defendant then walked up to where the deceased, Annabelle and the witness were standing and said to witness, "I wouldn't have told you to go to H—"; that the witness said, "Excuse me"; that the deceased said, "Don't tell him anything"; that the witness, the deceased, and Annabelle proceeded to walk on toward First Street; that witness, deceased, and defendant walked a little further and then the defendant said to deceased, "Is that your sister?" and then added, "I don't believe that is you sister, I believe that is your girl friend", and the deceased said, "All right, then both"; that during this conversation between the defendant and the deceased the defendant was behind the deceased and the witness; that just as the witness and the deceased, and Annabelle got to an alley, at about No. 8 L Street NW., the defendant said to the deceased, "You're supposed to be some sort of a bad fellow"; that the deceased replied, "I've got the stuff to be bad with"; that the witness, the deceased, and Annabelle continued up L Street and stopped in front of No. 16 L Street "forgetting all about this argument, or whatever it was"; that as the deceased stood there whistling for one Paul Williams, who lived at No. 16, the defendant, without warning, came up and said, "So you have the stuff to be bad with", and fired



two shots at the deceased; that the deceased then ran up the street on the same side to about No. 50 L St., where he fell, and then got up and ran again, and Annabelle ran across until he fell a second  
12 time; that the street and witness remained at the same place; that the defendant said to witness, "Now you run", and fired a shot at witness and that witness ran across the street; that when defendant came out of the store he had a brown paper bag and that just before he shot the deceased he did not have that bag in his hands; that the deceased had no weapon, and did not make any gesture or threaten the defendant or do anything at all just before he was shot.

On cross-examination witness testified that she had not known the defendant before and that she did not think the deceased knew the defendant before; that the defendant only said, "Hello, baby" to witness and that he did not swear at her; that witness, deceased, and Annabelle proceeded up the street; that defendant was behind them; that 16 L St. is eight doors from the corner of North Capitol and L; that when defendant reached 14 L Street the defendant stopped; that he was in front of 14 L Street, about 6 feet from the deceased, when he fired the gun. On further cross-examination witness testified that after defendant said to deceased, "You think you are a tough guy, don't you"; that deceased said, "I've got the stuff to be bad with"; that when deceased made that remark he had his hands in his pockets; that the first conversation between defendant and deceased occurred at about No. 4 L Street; that witness did not see any weapon on the defendant when he was going into the liquor store; that she never saw a weapon on the defendant until the shot was fired.

By Mr. SITNICK:

"Q. Exactly what tone of voice was Tuckson using? He was talking like he was mad, was he not?"

"A. Talked like he always talked.

"Q. Yes; but wasn't he talking at that time like he was mad when he said, 'I have the stuff to be bad with'?"

"A. I think so."

On redirect examination witness testified that when deceased said, "I've got the stuff to be bad with", it was on the way to 16 L Street; that deceased said nothing just before shot was fired; that the defendant, before he came up and fired the shot was back by the alley, by the group of men.

Recross examination by Mr. SITNICK:

"Q. Didn't you testify that he [meaning defendant] was in front of 14 L Street when the shot was fired?"

"A. Yes, sir; he fired the gun in front of 14 L Street.

"Q. Yes; and did you or did you not know that he lived at 14 L Street?"

"A. No, sir; I didn't know until I was told."

[The defendant was then requested to stand up before witness.]

"Q. He [meaning the deceased] was taller than he [meaning the defendant] was he not?"

13 "A. Yes, sir; I think and stouter, a little bit stouter."

ANNABELLE LANHAM was called as a witness on behalf of the United States and testified substantially as follows: That she was 14 years old and in school; that she had known William Tuckson for



about two years before his death; that on October 9th she lived at 123 L Street, NW.; that on that evening she and Dorothy Ferguson were coming up North Capitol Street about 9:30; that deceased was standing on the corner of North Capitol and L Street; that witness reached the deceased before Dorothy, because Dorothy stopped to talk to two boys; that witness saw defendant who she did not know, and another fellow come down the street going into the liquor store; that as the defendant and the other fellow were going into the liquor store, Dorothy was passing the liquor store; that the defendant said something to Dorothy and that Dorothy told the defendant to go to h—; that then Dorothy came over to where witness and deceased were; that witness, Dorothy, and deceased walked up L Street and that defendant and other fellow came up the street behind them; that the defendant had a bag in his hand.

Questioned by Mr. ROBB:

"Q. All right.

"A. And a group of men were standing on the corner of the alley.

"Q. What alley is that?

"A. That alley that runs from L Street back there to Fenton Place.

"Q. What is the house, there, beside the alley? What is the number of that house?

"A. No. 8 L Street.

"Q. No. 8?

"A. Yes, sir.

"Q. All right.

"A. And Bostic, he—I guess he gave this bag to these men, or he took something from them, and he ran up the street where William was, and shot him.

"Q. Where was William?

"A. William was standing in front of No. 16 L. Street.

14 "Q. No. 16? Now, before you got up to No. 16, was there any talk between William and Bostic?

"A. Bostic asked William was Dorothy anything to him, and William said, 'My sister', and Bostic said, 'You act as if she was your sister and girl friend, too', and William said, 'She is both.'

"Q. And what happened then?

"A. Then Bostic said, 'You're supposed to be bad, aren't you?' and William said, 'I've the stuff to be bad with', and then Bostic ran up where William was and he said, 'You've the stuff to be bad with', and shot him.

"Q. Now, let me ask you this: Where were you all, when this conversation took place between Bostic and William?

"A. We were walking up the street.

"Q. And about where were you on the street, what house number?

"A. About No. 16.

"Q. Now, did you see where Bostic came from when he walked up to William, or ran up to him, to shoot him?

"A. From No.—that house on the corner of the alley—No. 8.

"Q. On the corner of the alley?

"A. Yes.

"Q. And when he came up there to where you were, did he have any bag in his hand?

"A. No; he didn't.

"Q. How did you happen to stop at No. 16?



"A. Well, William stopped and whistled, when he got in front of No. 16.

"Q. For whom?

"A. Paul Williams.

"Q. Where did Paul Williams live?

"A. He lived at No. 16.

"Q. At No. 16?

"A. Yes.

"Q. Now, did Tuckson have any kind of weapon that you saw?

15 "A. He didn't show any.

"Q. Did he do anything to Bostic, or make any attempt to strike him?

"A. No; he didn't.

"Q. Threaten him in any way?

"A. No.

"Q. Did Tuckson say anything to Bostic, just before he was shot, after Bostic came up to No. 16?

"A. No.

"Q. Now, after Bostic shot Tuckson, what happened?

"A. William ran, and I ran, too, but Dorothy, she still stood there, and Dorothy said that Bostic said to her, 'You can't run, can you?' And shot at her."

Witness further testified that, during all this time, deceased's hands were in his pockets; that he walked along with his hands in his pockets.

Cross examination by Mr. SITNICK:

"Q. Did Bostic say anything when he came out of the liquor store?

"A. He said, 'I wouldn't have told you to go to h—.'

"Q. He wasn't made or anything, was he?

"A. He didn't seem to be.

"Q. And was Dorothy mad?

16 "A. No; she told him, 'Excuse me.'

\* \* \* \* \*

"Q. Now, where was Bostic when the shot was fired?

"Q. Bostic was standing a little off from William.

"Q. Where?

"A. He was not standing very near William, but he was standing near enough to shoot him.

"Q. About as far as I am from you?

"A. Not quite this far.

"Q. Nearer than that?

"A. Yes.

"Q. Closer; about this far; is that correct?

"A. Yes; about that far.

"Q. Which would be about five or six feet. Is that correct? And before Bostic shot him, what did William say?

"A. William said, 'I have the stuff to be bad with.'

"Q. And he was mad, wasn't he?

"A. He didn't seem—he didn't seem to be mad.

\* \* \* \* \*

"Q. Now, how soon before he shot him did he say, 'I have the stuff to be bad with'?



"A. Well, he seemed to have forgot all about this argument when this Bostic ran up there and shot him.

"Q. And he didn't shoot him before he said that, though, did he?

"A. No; he didn't.

"Q. And William was turned around toward him when he shot him, wasn't he? He was facing him, wasn't he?

"A. I don't remember.

"Q. You don't know whether he was facing him?

"A. William was facing No. 16 L Street.

"Q. And was he facing him?

"A. I don't remember whether he was or not."

17

On redirect examination by Mr. ROBB:

"Q. When this remark was made by William, 'I've got the stuff to be bad with', was that when he shot him or before that?

"A. That was before that.

"Q. How long before?

"A. About 5 or 10 minutes.

"Q. There was some little interval, is that what you mean?

"A. Yes, sir."

Recross examination by Mr. SITNICK:

"Q. Mr. Robb asked you as to what time elapsed between the time he said, 'I've got the stuff to be bad with' and the time he shot him?

"A. I don't know what time.

"Q. It was not 10 minutes, though?

"A. I didn't say 10 minutes; I said 5 or 10 minutes."

JOHN WEAVER was called as a witness on behalf of the United States and testified substantially as follows: That he had known the defendant three or four years; that he was living at 14 L Street NW., the same house where defendant lived; that about 8:00 o'clock on the evening of October 9, 1936, witness, defendant, and two others bought a half pint of liquor and all four drank it; that later defendant and Frank Martin went down to the liquor store to get two cans of beer; that witness was standing right at the corner of the alley; that afterwards witness saw defendant, Martin, Dorothy Ferguson, Anabelle Lanham, and deceased, come up the street, deceased and the girls being in front of defendant; that "when he (defendant) got about even with us he asked the Tuckson boy which one of them was his wife or sister. The Tuckson boy told him both of them"; that Tuckson and the girls then walked up the street three or four doors; that the defendant walked about four doors above from the alley and there shot the deceased; that witness heard defendant say to the deceased, "You want to be bad, don't you?" and that

18 the deceased said nothing only walked on up the street; that when defendant came out of the beer store he had a paper bag in his hands; that the defendant fired three shots; that after the first shot deceased started running and the defendant fired again; that the defendant fired at Dorothy, saying, "You act stubborn, don't you?"; that after that defendant went into his house and drank his beer; that witness asked defendant then why defendant shot the boy and defendant didn't say. Witness further testified that if deceased threatened the defendant witness didn't know; that the de-



fendant was not apprehended the same night, but at some time later when witness notified the police.

On cross examination witness testified that the defendant was in front of 14 L Street when he shot, and that the defendant lived at 14 L Street; that witness didn't hear deceased say, "I got the stuff to be bad with"; that the deceased's hands were never in his pockets, but were on the outside; that he only heard deceased say, "I do not go to be bad."

EDWARD STEVENS was called as a witness on behalf of the United States and testified substantially as follows: That he had known the defendant all his life; that they came from the same town in North Carolina; that about 8:30 or 9 o'clock on the night of October 9, 1936, witness, John Weaver, Frank Martin, and the defendant were standing talking at the corner of the alley between 14 L Street and the whiskey store; that the whiskey store was on the corner of North Capitol and L; that then defendant got a half pint of whiskey and all four drank it.

By Mr. ROBB:

"Q. What happened after you had the half pint?

"A. I told him I would be going home.

"Q. Told who?

"A. Bostic.

"Q. All right.

"A. He said, 'Wait. I will go get you all some beer', and he went and got two cans of beer, and he came, when he got along by us there he handed it to John Weaver. I do not know whether he  
19 wanted for John Weaver to hold——

"The COURT. When he got along where?

"The WITNESS. When he was about the corner of the alley, and asked the Tuckson boy, 'Is this your wife?' He said, 'Yes; my wife, and sister, too.'"

By Mr. ROBB:

"Q. When did that happen?

"A. That was after he came back up to the corner of the street with the beer.

"Q. Go ahead.

"A. And the Tuckson boy walks on off. James, he walks off behind him. When I looked around again there was shooting behind me.

"Q. What?

"A. He got shot then.

"Q. Who shot?

"A. Bostic.

"Q. All right.

"A. This boy broke in a run, and he shot again.

"Q. What boy broke in a run?

"A. The Tuckson boy; and he said to the girl, 'It is too bad you can't run', and he shot at her and walked down towards us, and came in the back and went in the house.

"Q. What house was that?

"A. 14. When I got in the house he was standing in the dining room talking, and I got my cap and left.

\* \* \* \* \*



"Q. How many doors from the place where Bostic turned around and handed the beer to somebody was the place where he did the shooting?

"A. It was about five doors down, I think.

"Q. About five doors down?

"A. Yes.

"Q. Did you see this fellow Tuckson do anything to Bostic, or threaten him in any way?

20 "A. No, sir."

On cross examination the witness testified that he had never seen the deceased or the two girls before; that he did not see deceased put his hands in his pockets; that he did not hear the deceased say, "I have got the stuff to be bad with"; that when deceased walked off witness did not pay much attention.

WARREN N. SMITH was called as a witness on behalf of the United States and testified substantially as follows: That between 8:30 and 9 P. M., on October 9th, he was sitting in his automobile in front of his home at 54 L Street and he heard three loud reports; that he heard someone running heavily up the street and fall in front of 52 L Street, then get up and start running again, and finally fall in front of 70 L Street; that witness came up to where the person had fallen and recognized him as William Tuckson; that witness took him to the hospital where deceased was pronounced dead; that the deceased was searched at the hospital and the only things found on him were some keys; that witness saw no weapon on or in the presence of deceased, on L Street or anywhere.

SOPHIE LEE SMITH was called as a witness on behalf of the United States and testified substantially as follows: That she lived at 14 L Street; that on October 9, 1936, witness was awakened there by some shooting and came downstairs, and while there the defendant  
21 came in, grabbed the gun out of his pocket and said he was going to shoot, and that witness became frightened. To this testimony counsel for defendant objected on the ground that it was immaterial and also a separate incident, and therefore moved that it be stricken from the record; the court sustained the objection, ordered it stricken, and instructed the jury to eliminate it from their minds and consideration altogether.

CLYDE N. STRANGE was called as a witness on behalf of the United States and testified substantially as follows: That he was a sergeant attached to Headquarters and assigned to the Homicide Squad and assigned to the investigation of this case. Witness identified the Government's exhibits 1, 2, and 3, being photographs of the place where the shooting occurred, as truly representing said place; that witness was at the scene of the homicide on the night it occurred and that he did not find the defendant there; that the defendant was arrested at 1:00 A. M. on October 22; that witness first saw defendant on October 22, at 9:20 A. M. when the defendant was brought to the office of the Homicide Squad; that at that time the witness had a conversation with the defendant, the conversation being as follows:



Witness telling of conversation: "I told him that he was charged with shooting to death William Tuckson, that he had been out of town for ten or eleven days, that we had been looking for him, and asked him, and he told me he had been out of town most of the time, and got back this morning. I asked him where he had been, and he told me several different cities down South where he had been. I asked him how he came not to stay any length of time in those different cities and he said that the law was after him down there, it kept him on the jump. I asked him if he had done the shooting and he said he did, and I asked him why he did it and he told me. He said he spoke to one of the girls down on the corner of North Capitol and L as he went into the whiskey store to buy two cans of beer, and that she cursed him, and when he came out she was still there. He approached Tuckson about it and asked him if it was his wife. He told him no, it was his sister, and told him, "You better learn her how to talk to people." He said they had a few words there, and they came out of the store, and when they got by the alley where four or five other colored boys was standing, he asked him again if it was his wife, and then he said it was his wife and sister, too. He said he walked up the street, and he had his hand in his pocket and he handed the beer to Martin or one of the boys.

22

"By Mr. ROBB:

"Q. Who had his hands in his pockets?

"A. Tuckson; and he said that he took the gun out from under his belt, and fired two shots at Tuckson. He said one of the girls with Tuckson ran down behind a car and across the street, and one stood there. He fired one shot at the feet of the girl, and asked her why in the hell she didn't run. She started screaming and went down the street. Then he went through the alley and went back and came into the house. He said he got his girl, Sarah Minor, and went out the back way, got a cab, and got \$15 that he had given to Ida Bush to keep for him, and then went to 627 New Hampshire Avenue with Sarah Minor, and left her out and went to a lunchroom on 27th Street, and came back and spent the night with Milton Minor.

The next morning he went out New York Avenue, where the Hecht Company warehouse was under construction, and went to work. He said around 10 o'clock Sam Bush came over and said things were growing hot, and the boy was dead. Then he went to the foreman and said his sister was dead down in South Carolina, and he would like to get his money. He wanted to go down and bury her. He said he left then and sent a taxicab driver around to the rear of 14 L Street to get his clothes, and Sam Bush and Den Biggs came back with the driver and the clothes. He got in the cab and changed shoes with Bush while in the taxicab, and Bush got out of the cab up in front of the White House and took the suitcase and clothes back over to 202 K Street Northeast. Around 1 o'clock some time that afternoon he went across the Lincoln Memorial Bridge, and as he did he threw the pistol into the river. I asked him what kind it was, and he said it was a .38 caliber Iver-Johnson pistol. I advised him of his rights and told him that he did not have to make a statement unless he cared to, and that anything that he might say would be used in court or in any other hearing should it be necessary.



He stated he wanted to tell all about it. I then got the clerk and had him take the statement from Bostic."

Witness then testified that he then got the clerk and had him take the statement from the defendant, and that said statement was typed and given to the defendant who read and signed it.

"By Mr. ROBB:

23 "Q. By the way, Sergeant, was there anything said in this conversation about some remarks, 'I got the stuff to be bad with', or something like that?

"A. Yes; he said Tuckson told him he had the stuff to be bad with, when they got back about around in front of 14 and 16 L Street.

"Q. Was there any mention of some beer?

"A. Yes; he said he had two cans of beer and handed them to one of the boys standing by the fence on the corner of the alley.

"Q. When did he say he handed them to him? At what point in the action did he say he handed the cans of beer to this boy?

"A. After he and Tuckson had a few words, Tuckson walked around him and walked on up the street, he said he then handed the beer to one of the boys and took the gun from under his belt."

And then the following occurred:

"By Mr. ROBB:

"Q. Have you got that statement here, Sergeant?

"A. I have."

"Mr. SITNICK. One question on a preliminary matter. You testified. Your testimony was the substance of that statement, isn't that true?

"The WITNESS. I can't remember all the statement.

"Mr. SITNICK. Yes; but what you testified from was on this statement? That is true, is it not?

"The WITNESS. This is his statement. I testified what he told me.

"Mr. ROBB. But all that you said is on this statement?

"The WITNESS. I could not say whether it is on there or not.

"Mr. SITNICK. You did refresh your recollection from that statement, didn't you?

"The WITNESS. I did look over the statement.

"Mr. SITNICK. I will object to the admission of this statement on the ground that if an instrument, or some paper writing is used to refresh recollection it cannot be used in evidence to corroborate the testimony.

"The COURT. That is not the purpose for which it is offered. It is offered as a signed statement of the defendant.

"Mr. SITNICK. But they should have offered it in the beginning in the absence of this testimony. It just amounts to the same thing.

24 "The COURT. That may be a proper comment on the testimony of Mr. Strange, but it does not affect the admissibility of this statement itself."

Whereupon the objection was overruled, an exception duly noted and allowed.

The signed typewritten statement of James Bostic of date Thursday, October 22, 1936, 9:20 a. m., was thereupon marked "Government Exhibit No. 4" and received in evidence. The statement was read by Mr. Robb and is as follows:



"OFFICE OF THE HOMICIDE SQUAD,  
"MET. POLICE DEPARTMENT,  
"Washington, D. C., Thursday, October 22, 1936.

Re: The Death of William Tuckson, Colored, 17 years

"Statement of James Bostic, colored, 24 years, 14 L Street NW., by  
Det. Sgt. C. N. Strange, of the Homicide Squad:

"James Bostic, you are held on account of the death of William Tuckson, colored, 17 years, late of 1016 1st St. NW., who came to his death at Freedman's Hospital, 9:50 p. m., October 9, 1936, said death the result of injuries he received when shot with a 38 Caliber Iver Johnson Revolver held in your hand or hands about 9:30 p. m., October 9, 1936, while in street in front of No. 16 L Street NW. You have made a verbal statement to the effect that you are the one who fatally shot William Tuckson. I am now going to ask you to make a statement that can be taken down in typewritten form, relative to this shooting of William Tuckson, but before doing so I care to advise you that you do not have to make a statement if you do not care to and that same will be used in court, should it be necessary. I also care to advise you that this statement must be made without any promises or force being made or used by me to obtain same. After hearing what I have told you do you care to make a statement?

"Answer by JAMES BOSTIC: 'Yes, sir; I want to tell the truth about it.'

"By Det. Sgt. C. N. STRANGE:

"Then James talk slowly and clearly and after you have made your statement and answered the questions I will ask you relative to this case I want to have you read same over carefully and if there are any changes whatsoever you wish made in same just make those changes known and they will be made according to your wishes.

"Statement:

25 "I was at 14 L Street NW., some time around 8:00 p. m. Friday night October 9, 1936, with Sam Bush, John Weaver, Ida Bush, Ida Brown, Sophia Smith, Eddie Stevens, Frank Martin, and Sarah Minor came there. Me, Eddie Stevens, Sam Bush, John Weaver, and Frank Martin went to the whiskey store at North Capitol and L Streets and we got some Wilken Family Whiskey (one pint). Then we went back to the house and drank that whiskey. Then me and Frank Martin went back to this store and before I got to the store I saw one colored man and one colored girl on the southwest corner of North Capitol Street and I saw another colored girl coming around the corner in front of the whiskey store and I said to her "hello lady" and she said to me "Go kiss my a— and go to hell, you ain't got no business speaking to me." Then she walked over to where that colored fellow and the colored girl were standing on the southwest corner. I goes into the whiskey store then and gets two cans of beer and I comes out of the store and then I had to pass this colored man and the colored girl that I said hello to and when I got to them I said to the colored man with the girl that I spoke to "Mister, is that your wife" and he said



to me, "No; she's my sister", and I told him he ought to teach her how to speak to people and the other colored girl there with her said to me, "G— D— it, you spoke to her didn't you?" and then this colored man asked me what about it, and then this colored fellow told me that she wasn't his sister but that she was his woman, and he told me that he would back her up in anything she says.

"Then I walked up west on L Street towards my house and this colored fellow and these two colored girls walked up the same way behind me and then they walked around me and passed me and stopped in front of 16 L Street NW., and then this colored fellow said to me, "Your suppose to be bad, aren't you?" and I told him, "no, but G— D— it, your suppose to be bad", and then he told me that he had something to be bad with and he put his hand in his pocket and then I turned around and handed the beer that I had in my hands to Frank Martin and then I turned around and shot William Tuckson. I shot at Tuckson twice and then he ran off of the sidewalk and around an automobile, and then I turned to the colored girls that I had the words with and I said to her, "what's the matter with you, can't you run; get the hell going then", and

26 then I fired one shot in the ground behind her and then she left there screaming and hollering. Then I turned around and went through the alley and went into the back way of 14 L Street NW., with the gun still in my hand and all of them in the house got scared and I told them they had nothing to be scared about because I did the shooting. I then went upstairs and got Sarah Minor, and me and her went out the back way of 14 L Street NW. and got into a cab, and I also got fifteen dollars from Ida Bush that I gave her to keep for me until the next morning. We then went over to 627 New Hampshire Ave. NW., where I left Sarah out of the cab and I got out, too, and then I went to the lunchroom on 27th Street and got something to eat and then came back to Sarah Minor's house and went to bed with Milton Minor.

"The next morning I got up and went to work at Hecht's warehouse in the northeast and I worked there for about two hours, and then Sam Bush came there and told me that things were getting hot and then I went to the foreman and told him that I had a little trouble last night and that I wanted my time, and then he gave me my time and told me to go to the office and get my time and he told me to tell them at the office, if they asked me anything, to tell them that my sister was dead and that I was going away to bury her. I went to the office and got my money. I then went to 1007 2nd St. NE., where I got a taxi driver to go to the rear of 14 L Street NW. and get my clothes and bring them back to me, and Sam Bush and Ben Diggs came back with the cab driver with my clothes. Then I got in the taxicab with them at 2nd and K Sts. NE. and changed my shoes with Sam Bush. We then went up by the White House, where Sam Bush got out and got another cab and took the suit case and clothes to 202 K St. NE. Then I went across the Lincoln Memorial Bridge and went to Alexandria, Virginia, where I caught the train to Columbia, South Carolina. I stayed around Columbia until Monday and then I went to Edgefield, South Carolina. I left Edgefield Tuesday morning and went to Augusta, Georgia. Then I went to Jacksonville, Florida, and I came back to Edgefield last Saturday



morning, October 17, 1936, and left Edgefield Sunday night, October 18, and came back to Columbia and then left Columbia and got in here to Washington 1:00 a. m. this morning October 22, 1936, and went to 14 L Street NW., and went to bed, and John Weaver—one of the colored boys there—went out and called the police and the police came and arrested me. That's all of it.' ”

27 “Questioned by Det. Sgt. C. N. STRANGE, of the Homicide Squad:

“Q. How long have you lived at 14 L Street NW.?

“A. Since last July.

“Q. Has William Tuckson or either one of those girls with him that night of the shooting ever been in the house at 14 L Street NW. since you have been there?

“A. No, sir; I never saw them there.

“Q. Did you know either of them?

“A. No, sir.

“Q. Had you ever seen them before?

“A. No, sir.

“Q. Then, not knowing this girl, do you think it was the proper thing for you to speak to that girl who was walking along the street minding her own business?

“A. No, sir; but I spoke to her in a decent way, that's all.

“Q. At no time, did you see Tuckson with a weapon of any kind?

“A. No, sir; I did not see it.

“Q. Did Tuckson, at any time, strike you before you shot him?

“A. No, sir.

“Q. You was right in front of your door when you turned and handed the beer to Frank Martin, were you not?

“A. Yes, sir.

“Q. Why did you not go into your house instead of turning around and shooting Tuckson?

“A. When he threw his hand on his hip I wanted to protect myself.

“Q. You stated in your original statement that he put his hand in his pocket before you handed Frank Martin the beer; don't you think that if Tuckson was going to do you any harm he would have done it before you handed over the beer to Martin and then turned and shot him?

“A. Well he made towards me with his hand in his pocket.

“Q. How many shots did you fire altogether?

“A. Three shots—two at Tuckson and one at the feet of the girl.

“Q. Who's gun did you have?

“A. It belonged to me.

28 “Q. Where did you have this gun?

“A. In my belt under my jacket.

“Q. What kind of a gun was it?

“A. A .38 caliber Iver Johnson.

“Q. What did you do with this gun after the shooting?

“A. I took it on with me and threw it into the Potomac River as I started across the bridge.

“Q. How long have you had this gun?

“A. Since last August. I bought it in August.

“Q. Where did you get it?



"A. I bought it from a boy in the street.

"Q. Why did you buy it?

"A. Well, I just bought it.

"Q. Isn't it a fact that Tuckson was standing on the sidewalk in front of 16 L Street NW., whistling to Paul Williams to come out of the house when you turned and shot him?

"A. No, sir.

"Q. Is there anything further you care to add to this statement at this time that you have not already mentioned?

"A. No, sir.

"Q. This statement that you have made is true and correct and the statement you have made and the answers you have given to the questions asked are free and voluntary and you have not been promised any help or been mistreated in anyway whatsoever, for the purpose of making this statement or answering the questions asked; is that so?

"A. Yes, sir.

"Q. Can you read and write?

"A. Yes, sir.

"JAMES BOSTIC.

"Witnesses:

"C. N. Strange, D. B.

"WRE:

"W. R. Ellery."

29 Thereupon counsel stipulated that if William B. Ellery were present, he would have testified on behalf of the United States that the preceding statement was typed by him and that it accurately reflected what was said by the defendant at that time.

At this point the Government rested.

Whereupon counsel for the defendant made his opening statement.

Counsel for both sides then approached the Bench, and counsel for the defendant made his motion for a directed verdict on behalf of the defendant. The motion was based on the ground that the Government, from their own evidence, had shown that there was provocation, and that the shooting was not deliverate. The motion was overruled and an exception duly noted and allowed.

#### EVIDENCE ADDUCED ON BEHALF OF THE DEFENDANT

SAM BUSH was called as a witness for the defendant and testified substantially as follows: That on October 9, 1936, he lived at 14 L Street NW., where defendant lived; that he was subpoenaed as a witness by the United States; that he had never spoken to counsel for defendant about the case; that witness and Eddie Stevens were standing at the corner of the alley and the deceased and two girls came up the street; that the defendant asked the deceased, "Is that your wife or your sister?" and deceased said, "Yes; it is my wife and my sister, too"; that the defendant said, "You try to be bad, don't you?" and the deceased said, "No; I ain't bad; I got the stuff to be bad with"; that this was said just before the deceased was shot; that witness then heard the pistol fire and saw the deceased running up the street; that then defendant said to the girl, "Can't you run?" and then the pistol fired again; that then the defendant went into the



house. Witness further testified that he owned no interest in the gun that was used; that on the morning of the 10th of October witness went around to where defendant worked to get his boots; that the defendant asked him if he heard anything; that witness told defendant he heard deceased was dead; that he did not tell  
30 defendant the law was after him; that on the night of the 10th he went with defendant in a taxi from 1107 Second Street to the White House, where they got out and defendant gave him defendant's suitcase; that he took the suitcase to 2002 K Street NW., and did not see defendant after that; that immediately before the shooting defendant and Tuckson were 4 or 5 doors apart.

On cross examination witness testified that the defendant was 4 or 5 doors away from the deceased and then he walked up to where Tuckson was and shot him; that when deceased said, "I have got the stuff to be bad with", deceased was walking up the street and the defendant was behind him. Witness was asked by prosecutor if deceased was doing anything to the defendant, to which witness replied, "No, sir; not as I knows anything about."

31 FRANK W. MARTIN was called as a witness for the defendant and testified substantially as follows: That he was subpoenaed as a witness by the United States; that he has known the defendant about six months and that he did not know the deceased; that on the night of October 9, witness went to defendant's house to see about working the next day; that when he got there the defendant was lying on the bed; that they then went out and joined two other boys and stood at the corner of the alley talking; that then the four of them bought a half pint of whiskey and stood in the alley and drank it; that then someone suggested getting some beer, and the defendant volunteered to get it, asking witness to go along with him; that when he and the defendant were going into the store he heard the girl say to the defendant, "Go to h—"; that after they bought the beer they came out of the store; that the defendant was walking and the deceased and the two girls were behind the defendant; that witness was behind the deceased and the two girls; that the defendant stopped at the corner of the alley to talk to the boys who were there; that witness walked up to the crowd, and Bostic was standing there talking, so witness stopped too; that all of a sudden Bostic walked off from the crowd and said to the deceased "Is that your wife or your sister?" and as witness looked around he heard the deceased say "Both of them"; that at that time the deceased and one of the girls were facing the defendant and the other girl was walking up the street; that then the defendant said, "You is a bad so-and-so" and the deceased said something which witness couldn't understand because he was too far away; that it was then that defendant fired the shot. Witness further testified that the deceased had something in his right hand, and that he couldn't see exactly what it was.

On cross examination witness testified that Bostic stopped at the corner of the alley before witness got there; that when Bostic stopped deceased and the two girls passed on by; that witness came there  
32 and stopped; that Bostic walked off right behind deceased and the girls; that he couldn't tell exactly what it was that the deceased had in his hand, but that it was round and about as big as a shoe polish box; that the defendant said, "Is that your



wife or your sister?", and that when witness looked over where they were, the deceased was facing the defendant; that the place where Tuckson was standing when Bostic shot him was 4 or 5 doors from the place where witness and Bostic were talking.

On redirect examination witness testified that he had spoken to the prosecutor about the case.

IDA BUSCH was called as a witness for the defendant and testified substantially as follows: That on October 9, she lived at the  
33 same house where defendant lived; that she heard the shooting and that after the shooting, the defendant came into the house with the gun.

SARAH MINOR was called as a witness for the defendant and testified that she knew nothing about the homicide.

IDA BROWN was called as a witness for the defendant and testified that she knew nothing about the homicide.

Thereupon the motion for directed verdict was renewed, overruled, an exception duly noted and allowed.

JAMES BOSTIC was called in his own behalf and testified substantially as follows: That he was 24 years old; that he had lived in Washington for four years; that on October 9, 1936, he lived at No. 14 L Street NW.; that on the evening of October 9, he got off from work at about seven o'clock; that he then came home and was lying across the bed, when Frank Martin came in; that the defendant then went down to the liquor store and bought a half pint of whiskey, and then the defendant, Frank, Weaver, and Stevens drank the said whiskey in the alley; that the defendant then went to the liquor store to buy two cans of beer; that as he was going into the store, he spoke to a girl, and she said to the defendant, "Go to H"; that the defendant then said, "Gee! lady, you have got a nasty mouth", and then the defendant walked into the store, got the beer and came out; that when the defendant came out of the store, he saw the girl standing with the deceased and another girl; that the defendant then said to the deceased, "Mister, is that your wife?"; that the deceased said, "No; that is my sister; what about it? I will back up anything she said"; that the defendant then said, "Oh, you are upholding her devilment?"; that the deceased then said that he would back her up on anything she would say; that she was his sister and woman both; that the defendant then said, "Well, Mister, you are looking for trouble"; that then the deceased cursed him, and defendant walked up ahead of the deceased and the girls to the corner of the alley; that then the defendant proceeded ahead to No. 14 L Street and stopped; that then the deceased came out in front of the defendant and stopped and cursed the defendant again; that the defendant then said to the deceased, "You are supposed to be that little bad so-and-so"; that then the deceased  
34 are supposed to be the bad one"; that then the deceased grabbed his pocket for his knife or razor, or whatever he had; that then the defendant handed the beer to one of the boys and backed up, and when the deceased made for the defendant, defendant took out the pistol and shot the deceased. Defendant fur-



ther testified that he was scared of the deceased; that he thought the deceased was going to get him; that he is afraid of a knife because he had been cut before.

By Mr. Sitnick:

"Q. Did you think he was going to hurt you?

"A. Sure he was going to hurt me. He said he had something to hurt me with."

Defendant further testified that he happened to have the gun with him that night, as he had bought the gun in partnership with Sam Bush from a boy who lived at No. 14 L Street; that either defendant or Sam would carry the gun; that one of them always carried the the gun to keep John Weaver from getting it, John having threatened to kill his wife who was separated from him; that John had offered to buy the gun for that purpose; that defendant gave the gun to Sam Bush when defendant left Washington. Defendant further testified that after he shot, he ran into the alley and came into the house with the gun; that somebody asked him for the gun, but he kept it; that he was still scared. Defendant further testified that he was 5 feet 4 inches tall and weighed 140 pounds; that the deceased was a whole lot larger than he; that after the shooting the defendant got his \$15 from Ida Bush, took a cab and left.

By Mr. Sitnick:

"Q. Now, when you left the house, did you mean to kill anyone at that time?

"A. No, sir; I didn't. I didn't have that in my mind.

"Q. And had you known him—Tuckson—before you left the house?

"A. I have never seen him; not as I knows of.

"Q. And had you known any of the girls before you left the house?

"A. No, sir; not either one of them. If I wanted to kill him for nothing I could have did it on the corner before I even walked off from him. He followed me up to No. 14. That is where I was living. I still could go home."

On cross examination defendant testified that he was afraid of the deceased; that he was not afraid of the girl, but that the reason she said that the defendant shot at her, was that the gun fired three times; that the deceased ran up the street when the third shot was fired.

35

"By Mr. ROBB:

"Q. What did you shoot the gun the third time for?

"A. You may shoot the gun, like if you shoot a gun, you may shoot it two or three times before you know it and without your intention to shoot it at all."

Witness further testified on cross examination that the gun was not an automatic; that he did not tell the girl to get going; that all the boys were standing at the alley, except Frank Martin; that Martin was about four or five feet behind the defendant; that after Martin got up to the alley he stopped to talk to the boys there; that when the shooting occurred all of these boys had moved up and were at about No. 12 L Street; that the defendant didn't turn around to hand the beer over, but backed up and gave it to one of the boys



beside him; that the deceased didn't strike him, but struck for him, making at the defendant with a knife or something.

"By Mr. ROBB:

"Q. Did you see any knife in his hand?

"A. It was a knife or a razor, I couldn't tell exactly which one. I didn't take time.

"Q. How long was it?

"A. Oh, about as long as, you may say, an ordinary knife.

"Q. What color handle did it have?

"A. It was a black handle.

"Q. Black handle? Sure about that?

"A. Sure of that, sir.

"Q. Now, was that before you gave the beer to your friend, or afterward, that you saw this knife or razor?

"A. Just as I handed the beer, the knife or razor, one, came out of his pocket and he snatched it up."

Defendant further testified on cross examination that after the shooting he came into the house and drank the beer; that he did not know that the deceased was shot until afterwards; that he learned about it about 15 minutes or a half hour later, when he heard an ambulance; that then he did not know if deceased was dead.

And then the following occurred:

"By Mr. ROBB:

"Q. Now, you say you had this gun to keep John from killing his wife?

36 "A. That is right. He tried to buy it from us. That is one reason me and Sam wanted to keep it all the time.

"Q. And what purpose did you have the gun for in the first place?

"A. Me and Sam bought it together. He is the man of the house.

"Q. What did you buy it for?

"A. We just bought it for there in the house.

"Q. Did you have any use for it?

"A. No, sir."

Mr. SITNICK. I object to that because the question here is not the right to the gun, but whether the killing was justifiable.

Mr. ROBB. Mr. Sitnick went into it, if the court please, that is the only reason I am going into it.

The court thereupon overruled the objection, an exception was duly noted and allowed.

Witness then testified that the gun was fully loaded and that he had no use for the gun; that he was five feet and four or six inches tall.

Thereupon the following occurred:

"By Mr. ROBB:

"Q. Are you the same James Bostic who, on April ——"

"Mr. SITNICK. Just a moment, your Honor, I know what he is going to ask. I would like to approach the Bench.

"(Counsel for both sides approached the Bench, where the following proceedings were had not within the hearing of the jury.)

"Mr. SITNICK. He has a record of an assault, for which he received 60 days, Your Honor, I object to his asking it, on the ground that it does not involve moral turpitude, and Your Honor well knows what effect it has on the jury.



"The objection was overruled, an exception duly noted and allowed.

"The defendant then admitted that he was convicted of simple assault on April 23, 1936, for which he served 60 days in jail."

On redirect examination defendant testified that it was not necessary to cock the gun to fire it, but that it would shoot as fast as the trigger was pulled.

Whereupon, the defense rested its case.

37 Whereupon, the Court charged the jury as follows:

"The substance of the charge against the defendant, James Bostic, is contained in these words of the indictment, 'That he, James Bostic, contriving and intending to kill William Tuckson, Jr., purposely, and of his deliberate and premeditated malice, did shoot and kill the said Tuckson.'

"The indictment, itself, of course, is no evidence of guilt against the defendant. It is merely the formal accusation against him.

"He, as all defendants, is presumed to be innocent until his guilt is proved beyond a reasonable doubt; and 'reasonable doubt', as I have heretofore explained the term to you, is a doubt, based upon reason, arising out of the evidence, or the lack of it. It is such a doubt as will, after a full, candid, and impartial consideration of all the evidence, leave the juror's mind so undecided that he is unable to say he has an abiding conviction of the defendant's guilt; that is, a settled conviction, which he feels will continue to stand by him, in the days to come, and justify, in his own mind and conscience, a verdict of guilt. It is apparent, from this definition, that a reasonable doubt is not a mere whimsical or capricious doubt, or one based upon conjecture, or imagination, or aroused by feelings of sympathy, or mercy, or other emotion, or a hesitation to perform the unpleasant duty of convicting one. It is a doubt appealing to the reason and the common-sense, and approved by a conscientious judgment. Therefore, as you will see, it is not necessary that guilt be proven beyond all doubt, and to an absolute certainty. Ordinarily, the happenings between human beings cannot be proved beyond all doubt. The law recognizes that to be so. It recognizes that, in most of the happenings between men, proof to an absolute certainty is unattainable, and, therefore, the law does not require it; but, with a proper and a fair regard for the life and liberty and the good name of the citizen accused of crime, it does set up, as a fair protection to him, the requirement that the charge against him be proved beyond a reasonable doubt.

38 "I have granted certain prayers, which counsel for defendant has read to you, thus relieving me of the need of reading them, and it is proper I should state to you that, for the purposes of this case, they do state the law of the case, so far as they cover the subject to which they refer, and you will so consider them, as you would if I had stated them, myself, to you.

"On the one hand, it is the contention of the Government that the defendant shot Tuckson, with the deliberate and premeditated purpose to kill, and that he is guilty of murder in the first degree. That charge, of murder in the first degree, has within it all the elements of the lesser degrees of murder, so that it is possible that your verdict may be either murder in the first degree, murder in the second degree, manslaughter, or not guilty.



"A verdict of not guilty would be proper, if, in your reasoned judgment, you believe that the defendant acted in self-defense. That is his claim. That is his defense. The law following the law of Nature recognizes the right of a human being to defend himself against the violence of another, the law of self-preservation; but the law of the land limits that right within reasonable bounds, giving sufficient scope to one to defend himself, but not allowing him to go beyond the reasonable bounds of self-defense.

"Those rules, briefly stated, are these: There must be an actual menace of violence, of immediate, of imminent violence. If so, one has a right to meet the assault, with sufficient force to repel it, and to protect himself. When a deadly weapon is used and a fatal  
39 blow is struck, there must be the menace of death or great bodily harm, because only in case of a menace of death or great bodily harm is one reasonably entitled to take life, for his protection. That, of course, necessarily arises out of the rule which I have stated, that one, under the law, is only entitled to use reasonable force, such force as is reasonably necessary to protect himself, by meeting a force which is brought against him; and, if he goes beyond that, if he plainly goes beyond that, he goes beyond the right of self-defense, his act then is not justified, but is unlawful; so there must be, in this case, in order to have justified the killing, some menacing act on the part of Tuckson, some actual physical motion and menace, upon his part, which gave rise, in the mind of the defendant, to the belief that he, Bostic, the defendant, was then in danger, in immediate danger of death or grievous bodily harm, at the hands of Tuckson; but, beyond that, even though there should have been such a belief in the mind of Bostic, that, of itself, is not sufficient. It must have been a reasonable belief, under the circumstances as they existed at the time; that is, such a belief as a man of ordinary prudence, care and intelligence, would have had under the circumstances, and, if there were not, by reason of the circumstances, facts which would justify, in your reasoned judgment, as reasonable men and women, the right for the defendant to have believed, if he did believe, that he was in danger of death, or great bodily harm, at the hands of Tuckson, then, whatever his belief might have been, he would not have been justified in taking the life of Tuckson.

"The reason for that, of course, is simple. The law cannot give to every person the right to be his own judge as to when he may take human life, and so it sets up a standard, and it is a fair standard. It is the standard of reason and common sense, based upon what a person of reasonable prudence and caution would do under like circumstances. So, with this defense meeting you, here on the threshold of your consideration of the case, you will first dispose of it, one way or the other. Did Bostic shoot Tuckson in self-defense, within the meaning of that term, as I have explained it to you? If, after a fair consideration of all the evidence, you believe he did, or at least the evidence raises in your mind a reasonable  
40 doubt of his guilt of any of the degrees of murder or of manslaughter, then, of course, you will acquit him, and you would go no further with your consideration of the case; but if, after a fair and full consideration of all the evidence, you believe that he



did not act in self-defense, as the law defines that term, then you must go on to consider what degree of homicide he is guilty of.

"There is one possible aspect of the case, which makes it necessary for me to submit to you the question or subject of manslaughter; that is, the lowest degree of unlawful homicide. Manslaughter is the killing of a human being, without malice aforethought. In considering whether he is guilty of manslaughter, you will determine whether or not, although he may not have been justified in shooting Tuckson, because there was not a reasonable belief, under the circumstances, that he, Bostic, was in danger of death or great bodily harm, yet, did Bostic honestly have the belief that he was in danger of death or great bodily harm, even though it was not a reasonable belief? And did he, honestly entertaining a belief that he was in danger of death or great bodily harm, at the hands of Tuckson, and, gripped under the impulse of fear that his, Bostic's, life was in danger, shoot, through the impulse and feelings of an overpowering fear, although unreasonable, and not because of any desire and intention upon his part, actuated by reason, to do harm and evil to Tuckson. Under those circumstances, if you should believe they existed, you would be justified, then, in returning a verdict of manslaughter.

"If, however, in your reasoned consideration of the evidence, you do not believe that it justifies such a verdict, then you would go on to a consideration of the question, whether he is guilty of murder in the first degree or murder in the second degree.

"Murder in the first degree is the killing of a human being, purposely and with deliberate and premeditated malice.

"Now, you have this term malice, entering into that definition. It does not necessarily mean hatred or ill will. We, of course, in a lay sense, do look upon that term 'malice', as meaning a state of heart, a state of hatred and ill will, a desire for vengeance, a malevolent feeling against another. One may, of course, kill another with such feeling. That may be the motive of the killing; but,  
 41     within the meaning of the law, malice simply is the intentional doing of a wrongful and evil act, to the injury of another, without legal justification. In other words, if the defendant shot Tuckson, without legal justification; that is, without the right of self-defense, or without the circumstances which would reduce it to manslaughter as I have explained that term to you, then he is guilty, at least, of murder in the second degree, because he would have shot Tuckson with malice aforethought; and murder in the second degree is the killing of a human being with malice aforethought.

"Then, he must also have acted with premeditation. 'Premeditation' is simply the formation of the design, the intention to kill. I am speaking, now, of murder in the first degree. Did there spring into his mind the intention to kill Tuckson? Did he form that design? It does not necessarily involve any particular length of time within which to form such a design. It may be as quick as thought itself, and, as you know, action may follow thought so instantly that we consider all as one thing. The thought and the action seem to go together, and that is all that is necessary. If he did so form an intention or design to kill, then he did premeditate, for 'premedi-



tation' is a designing to kill. That, of course, is not enough, because you will recall that the definition of murder in the first degree also requires that the fatal blow shall be struck deliberately. That is a very crucial term in the definition, and is a very vital question for you to consider, in determining whether or not Bostic is guilty of murder in the first degree; for, if he did form the design to kill, there must have elapsed, between the formation of that design and the pulling of the trigger, which sent the fatal bullet into the body of Tuckson, a period within which he, Bostic, did deliberate upon the thought or design to kill.

"And what is 'deliberation'? Deliberation is consideration of an idea, of a design. It is the turning of that design over in one's mind, reflecting upon it, giving it second thought, giving it consideration. Now, did he do that? Did he form a design to kill, and did he follow it up with deliberation, as I have just explained that term to you? If he did, and, after such deliberation, there followed in his

42 mind, by reason thereof, a fixed and determined purpose to carry out a preconceived design to kill, and he shot the fatal bullet, by reason of such fixed and determined purpose, then he would be guilty of murder in the first degree. Did he deliberate, as I have explained that term to you? There must have been an appreciable period of time elapse between the formation of the design to kill and the actual execution of that design, within which there was deliberation; for, to give consideration to a design necessarily involves some time, some appreciable period, within which it is considered and reflected upon. And so the question is, here, in a case of this sort, where the whole episode took only, from the testimony of witnesses, somewhere between five and fifteen minutes, or perhaps ten minutes, whether there was, actually, this element of deliberation entering into the fatal shooting of Tuckson. If there was not, then Bostic, however brutal or unjustified the killing may have been, is not guilty of murder in the first degree, because murder in the first degree is not to depend upon the cruelty or brutality, necessarily, of the form of killing, but upon this crucial element of deliberation. In other words, it depends upon a state of mind, a state of mind which involves thought and reflection.

"If you have a reasonable doubt that Bostic did deliberate upon the killing of Tuckson, then, of course, you will give him the benefit of that doubt, in which event you will pass on from the consideration of murder in the first degree, to determine whether he is guilty of murder in the second degree.

"I have already referred to the nature of the killing constituting murder in the second degree, involving, as I have said, the killing of a human being with malice aforethought; that is, the shooting, in this case, of Tuckson, with the intention of shooting, with that intention dictated by reason, the ordinary mental processes which bring about action, unimpeded by the overpowering fear, such as I spoke of in the early part of my charge, which might have, for the moment, dethroned reason, and caused Bostic to act more by impulse and feeling, than by reason and judgment.

"It is not necessary, for murder in the second degree, that there shall be the actual intention to kill. It may be implied from the circumstances of the killing itself. When one shoots at another,



43 certainly when one shoots at the vital parts of the body of another, with a pistol, there is a likelihood that death will follow such an act; and if the act is such as that the natural and probable consequences of it would be death, then, regardless of whether there is any proof of actual intention to kill, you have the right to assume, to imply from such an act that he did intend to kill, based upon a very simple and just rule of law, that one must be held responsible for the natural and probable consequences of his act.

"So, did he shoot Tuckson, with the intention of killing, either express or implied, as I have defined the term to you, without the legal justification of self-defense, or those circumstances to reduce it to manslaughter? If so, he is guilty of murder in the second degree. Have you any reasonable doubt about it? If so, you will give him the benefit thereof. If not, your verdict would be 'Guilty of murder in the second degree.'

"There is evidence here of the fact that Bostic was convicted of an assault, not long ago, for which he served a jail sentence. That is only admitted as bearing upon his credibility as a witness, here, upon the stand. If he had not taken the stand, there would have been no proof of that. It is not proof, in any sense, to support the charge, here, that he murdered Tuckson. It was only given to you as reflecting upon the character of the man, for what you think it may be worth. You may not consider that it has any bearing, to determine the truth or falsity of his statements, or you may. In your own good judgment, you will determine that. You, of course, in weighing his testimony, and the testimony of every other witness, will do so with that understanding and discernment of human nature, and the power of judging one's statements, which you have learned, as men and women of experience in the world.

"You will determine whether a particular witness has any special interest, which might cause him or her to testify falsely. You may find that some witness has testified truthfully about some matters, and untruthfully about another. If so, of course, you will accept that part of his statement which you believe to be true, and reject the other part. You may find that he has so intentionally falsified regarding some important matter, that you do not put any confidence in anything that he says. If so, you have a right to reject all his or her testimony. That applies, of course, to the de-

44 fendant as to any other witness.

"Finally, you give to the testimony of the witnesses that weight which, in your good judgment, viewed in the light of all the testimony, it is entitled to, no more and no less, and, out of that testimony which, in your full investigation of the evidence, you accept as true, you determine whether or not the charge against the defendant has been proven, beyond a reasonable doubt.

"There were some references, here, in the course of arguments, to the fact that the Government summoned witnesses, who were not called in behalf of the Government, in support of the charge. I think, in a case of this importance, of this gravity, that there is a duty upon the part of the District Attorney to summon here into court every witness who, from his information, may seem to have any knowledge concerning the case; so that such witness will be



here, for the use of the Government, or the defendant, as the case may be. It seems to me that, in a case of this gravity, that is a duty imposed upon the District Attorney. Apparently, that duty has been recognized in this case and so, seemingly, all witnesses who might possibly have had any actual knowledge of the affair, were summoned by the Government, but that does not necessarily mean that the Government must put them all upon the stand. The Government, when it puts one upon the stand, vouches for the truth of his testimony, the substantial truth of it, and the prosecuting officers have a right, in their prosecution of the case, in an honest and fair way, to determine what witnesses they believe, what witnesses they are willing to stand by, in support of the charge, and to use the testimony of those witnesses, leaving it to the defendant to call other witnesses who have been summoned, but whom the Government does not care to vouch for.

“Now, in this case, such witnesses were called in behalf of the defendant. Some of their testimony is favorable to him. Whether it is true or false is solely a matter for you to determine. Whether the testimony of the Government witnesses is true or false, is solely a matter for you to determine. There is nothing I should say, and nothing I will say, to indicate where the truth or falsity in this case lies, because it is within your sole province to determine that  
45 important question; but you will take all the evidence, consider it fairly and impartially, and without any feeling of sympathy or prejudice, for or against the defendant, or any party connected with this case, then out of it all, through the faculties of your reason and judgment, search for the truth, and finding it, let it lead you where it will, in the conclusions which you reach. And, if you do that, you will have discharged faithfully the duty which you undertook, on your oath, to well and truly try the case, and a true deliverance make.

“The possible verdicts which you may render are—and I say ‘possible’, without putting any emphasis on any one of them, because I want to make no suggestion, whatever, to you, as to what your verdict should be, but the possible verdicts are ‘Guilty of murder in the first degree’, ‘Guilty of murder in the second degree’, ‘Guilty of manslaughter’, or ‘Not guilty.’”

At the suggestion of Mr. Robb: the court added the following to its charge: “There must be an appreciable period; that is, a period which you, in your judgment, would think, under the circumstances, was sufficient time for deliberation.”

The defendant’s prayers which were granted by the Court and read to the jury by counsel for defendant, follow:

#### Defendant’s Prayer No. 1

“The Court instructs the jury that upon the trial of a criminal case by a jury the law contemplates the concurrence of twelve minds in the conclusion of guilt before a conviction can be had. Each individual juror must be satisfied beyond a reasonable doubt of the defendant’s guilt before he can, under his oath, consent to a verdict of guilty. Each juror should feel the responsibility resting on him as a member of the jury and should realize that his own mind must be convinced beyond a reasonable doubt of defendant’s guilt before



he consent to a verdict of guilty. Therefore, if any individual member of the jury after having duly considered all the evidence in the case and after consultation with his fellow jurors, should entertain a reasonable doubt of defendant's guilt, it is his duty not to surrender his own convictions simply because the balance of the jury may entertain a different conviction." No obj. Granted. J. M. P., J.

Defendant's Prayer No. 2

46 "In a trial for murder when the defendant relies upon his right of *of* self-defense, the defendant's right to the possession of the pistol is not involved. The question is whether the killing was justified." No obj. Granted. J. M. P., J.

Defendant's Prayer No. 3

"The jury is instructed that it is the duty *or* the prosecution to show the jury beyond a reasonable doubt that the acts alleged were not done in self-defense, and if the jury are not convinced that the acts alleged were not in self-defense, but if there is a reasonable doubt in their minds as to whether or not these acts were in self-defense, then it *is* their duty to give the defendant the benefit of such doubt, and it is their duty to acquit him." No. obj. Granted. J. M. P., J.

Defendants Prayer No. 4

"The Court instructs the jury that the defendant in this case was entitled to act upon appearances, and if the language and conduct of the deceased was such as to induce, in the minds of a reasonable and prudent man, under all the circumstances then existing, and viewed from the standpoint of the defendant, that death or great bodily harm was about to be inflicted by the deceased upon the defendant, it does not matter if such danger was real or only apparent; and if the defendant acted in self-defense from real and honest conviction as to the character of the danger, induced by the existence of reasonable circumstances he should be acquitted, even though he may have been mistaken as to the extent of his danger." No obj. Granted. J. M. P., J.

Defendant's Prayer No. 5

"The jury is instructed that in determining the question as to whether the defendant had reasonable ground to apprehend that his life was in danger from the deceased at the time of the killing, that they can consider any threats that had been made by the deceased to the said defendant within a reasonable time of when the shooting occurred." No obj. Granted. J. M. P., J.

Defendant Prayer No. 6

"The Court instructs the jury that the indictment in this case is not to be considered as any evidence in this case, or of any evidence of guilt, but it is only the means of informing the defendant of the nature of the charge against him." No obj. Granted. J. M. P., J.



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## Defendant's Prayer No. 7

"The Court instructs you that if the defendant had reasonable grounds to believe that the deceased intended to kill him, the defendant, or do unto him great bodily harm, and that such design would be accomplished, he, the defendant, need not wait until his adversary gets an advantage, but may immediately kill him if necessary to avoid the danger." No obj. Granted. J. M. P., J.

## Defendant's Prayer No. 8

"The jury is instructed that in a prosecution for murder, if it appears that the defendant fired several shots, the evidence is for the jury to decide whether after the first shot any of the rest were accidental. The defendant may still be acquitted if the shots were fired in the heat of conflict while he believed he was fighting for his life." No obj. Granted. J. M. P., J.

Thereupon the jury retired to consider their verdict.

Whereupon a verdict of guilty of murder in the first degree was returned by the jury.

Counsel for defendant thereafter duly filed a notice of appeal to the United States Court of Appeals for the District of Columbia.

The foregoing is the substance of all the testimony bearing upon the exceptions herein reserved on behalf of the defendant.

And thereupon, and as all of said exceptions were noted and allowed as aforesaid and duly entered upon the minutes of the Court, before the jury retired to consider of its verdict, and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein, which is hereby ordered, so that the defendant may have his case reviewed on appeal, the defendant, by his attorney, moves the Court to sign and seal this, his Bill of Exceptions, to have the same force and effect as if each and every one of said exceptions had been signed and sealed separately, which motion is granted by the Court; and thereupon the defendant tenders this, his Bill of Exceptions, and requests the Court to sign and seal the same, which is accordingly done now for then, this 7th day of May 1937.

JAMES M. PROCTOR, *Justice*.

The foregoing Bill of Exceptions is satisfactory.

ROGER ROBB.

JOSEPH SITNICK.

(Endorsement on cover:) No. 6937. James Bostic, Appellant, vs. United States of America. United States Court of Appeals for the District of Columbia. Filed Mar. 24, 1937. Moncure Burke, Clerk.







UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA

*Amplification of record*

United States Court of Appeals for the District of Columbia.  
Filed Jun. 9, 1937. Moncure Burke, Clerk.

No. 6937

JAMES BOSTIC, APPELLANT

*vs.*

UNITED STATES OF AMERICA, APPELLEE

Appeal From the District Court of the United States for the  
District of Columbia

*Motion to amplify record on appeal*

Pursuant to Rule IX of the Supreme Court of the United States Criminal Rules, the appellant, by his attorney, moves this Honorable Court to allow him to amplify the record in the above matter, by making a part of the said record the annexed Order.

Joseph Sitnick,  
JOSEPH SITNICK,  
*Attorney for Appellant.*

I consent:

Roger Robb,  
ROGER ROBB,  
*For Appellee.*

District Court of the United States for the District of Columbia

Holding a Criminal Term

Criminal No. 58600

UNITED STATES OF AMERICA

*v.*

JAMES BOSTIC

*Order extending time within which to settle bill of exceptions*

On motion of the United States and for good cause shown, it is by the Court, this 20th day of April, 1937, ordered:

1. That the time for settlement of the Bill of Exceptions in the above entitled cause be, and the same is hereby, extended to and including the 10th day of May 1937.



2. That the United States of America shall file its proposed amendments, if any, to the Bill of Exceptions on or before the 3rd day of May 1937.

JAMES M. PROCTOR, *Justice.*

I consent.

JOSEPH SITNICK,  
*Attorney for Defendant.*

A true copy,

Test:

CHARLES E. STEWART,  
*Clerk.*

By SAMUEL SILVERMAN,  
*Asst. Clerk.*

(Seal of the District Court of the United States for the District of Columbia.)

United States Court of Appeals for the District of Columbia

April Term, 1937. United States Court of Appeals for the District of Columbia. Filed Jun. 14, 1937. Moncure Burke, Clerk.

No. 6937

JAMES BOSTIC, APPELLANT

*vs.*

UNITED STATES OF AMERICA

On consideration of the motion to amplify the record herein by making a part thereof the order of the trial court of April 20, 1937, extending to and including May 10, 1937, the time for settling the bill of exceptions, It is ordered that the motion be, and it is hereby, granted.

Per Mr. Chief Justice MARTIN.

JUNE 14, 1937.

A true Copy.

Test:

MONCURE BURKE,  
*Clerk of the United States Court of Appeals  
for the District of Columbia.*

(Seal of the United States Court of Appeals for the District of Columbia.)









UNITED STATES  
COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA

FILED SEP 24 1937

*Monarch R. ...*

CLERK

**No. 6937—Special Calendar**

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**In the United States Court of Appeals  
for the District of Columbia**

**JANUARY TERM, 1937**

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**JAMES BOSTIC, APPELLANT**

*v.*

**UNITED STATES OF AMERICA**

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**BRIEF OF APPELLEE**

**LESLIE C. GARNETT,**

*United States Attorney,*

**ROGER ROBB,**

*Assistant United States Attorney,*

*Attorneys for Appellee.*

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# **In the United States Court of Appeals for the District of Columbia**

**JANUARY TERM, 1937**

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**No. 6937—SPECIAL CALENDAR**

**JAMES BOSTIC, APPELLANT**

*v.*

**UNITED STATES OF AMERICA**

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**BRIEF OF APPELLEE**

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## **STATEMENT OF THE CASE**

The appellant has been convicted of murder in the first degree and sentenced to be electrocuted under an indictment charging that on October 9, 1936, he shot and killed one William Tuckson, Jr. On this appeal he contends that the verdict was contrary to the evidence, that there was no evidence of deliberation on the part of the appellant, and that the trial court erroneously permitted the District Attorney to develop on cross examination of the appellant that he had been convicted of simple assault.

The evidence at the trial was substantially as follows:

(1)



The deceased, William Tuckson, Jr., was a colored boy, sixteen years old, weighed about 179 pounds, and was 5 feet, 7½ inches tall (R. 8, 9). At the time of the homicide, appellant was twenty-four years old, 5 feet, 4 or 6 inches tall and weighed 140 pounds (R. 23, 25). On October 9, 1936, the appellant lived at Number 14 L Street Northwest. At about half-past nine that evening he went to a liquor store at the corner of North Capitol and L Streets—that is, at Number 2 L Street Northwest—to purchase some beer. As he was about to enter the store, Bostic encountered a fifteen-year-old colored girl named Dorothy Ferguson, who was passing by the store. Although this girl was a stranger to him, Bostic accosted her, saying “Hello baby.” She rebuffed the appellant and then walked to where the deceased and another young girl were standing nearby. In a few moments the appellant emerged from the store, carrying two cans of beer which he had purchased. Bostic walked over to where Tuckson and the two girls were standing and renewed his conversation with Dorothy Ferguson. At this point the four people walked up L Street towards Number 16 L Street. As they walked along appellant exchanged repartee with the deceased and when they were about opposite Number 8 L Street, Bostic said to the deceased: “You’re supposed to be bad aren’t you?” to which the deceased replied: “I’ve got the stuff to be bad with.” The appellant paused at Number



8 L Street, where a group of his friends were standing, while the deceased and the two girls proceeded to Number 16 L Street. Pausing outside Number 16 the deceased whistled to attract the attention of a friend who lived in that house. When the deceased whistled, Bostic, who was still at Number 8 L Street, handed to one of his friends there the bag containing his beer, walked or ran the fifty or seventy-five feet between him and deceased, and without further warning, shot the deceased, saying, "So you have the stuff to be bad with." When Tuckson turned to run, the appellant fired again at him, but missed. Tuckson ran to Number 70 L Street, where he fell. After shooting Tuckson, Bostic turned to Dorothy Ferguson, saying "Now, you run," and fired a shot at her. The appellant then retrieved his beer and went to his house at Number 14 L Street, where he consumed it. When the police arrived at the scene, appellant had fled and he was not apprehended until ten or eleven days later, when he told the police that he had left town to escape arrest.

The evidence showed that neither the deceased nor the two girls who were with him had known the appellant prior to the shooting. Eyewitnesses to the homicide, several of whom were old friends of Bostic, all testified that the deceased had no weapon and did not threaten or attempt to strike or injure Bostic. When the deceased was searched immediately after the shooting, moreover, no



weapon was found on his person (R. 15). One witness for the defendant testified that the deceased had something in his hand, but the object which this witness said he saw was clearly not a weapon, since "it was round and about as big as a shoe polish box" (R. 22).

The evidence showed that several minutes elapsed between the time when Tuckson and Bostic engaged in their verbal exchange and the time of the shooting (R. 9, 13). The eyewitnesses, both those who testified for the appellant and those called by the Government, agreed that during the interim the appellant paused at Number 8 L Street; there is no conflict on this point, as suggested in appellant's brief.

After his arrest, the appellant, in a written statement to the police, said that he had shot Tuckson because Tuckson "made towards me with his hand in his pocket"; that when Tuckson did this the appellant handed his beer to his friend and shot. He admitted that he had seen no weapon in Tuckson's hand and that Tuckson had not struck him (R. 20). In his testimony at the trial the appellant testified, however, that he saw a knife or a razor in Tuckson's hand; that it was about as long as an ordinary knife and he was sure it had a black handle; that the deceased struck at him with this knife or razor and that the appellant then backed up and handed the beer to his friend before shooting (R. 24, 25).

Over the objection and exception of the appellant, he testified on cross examination that on April 23, 1936, he was convicted of simple assault, for which he served sixty days in jail.

At the close of the Government's case and again during the presentation of the defendant's case, counsel for the defendant moved for a directed verdict on the ground that the evidence showed that the shooting was not deliberate. The motion was overruled and an exception noted. The motion was not renewed at the close of all the evidence.

### ARGUMENT

#### I

#### THE EVIDENCE SUPPORTS THE VERDICT

It is true that the appellant testified that he shot the deceased in self defense. Other witnesses testified, however, that the killing was unprovoked and unjustified. A question of fact was therefore presented to the jury, and the jury having given its answer, this is certainly not a case in which an appellate court should interfere. *Preston v. United States*, 65 App. D. C. 110, 80 F. (2) 702.

In order to sustain a conviction for murder in the first degree there must, of course, be evidence from which the jury could properly find that the killing was done deliberately. *D. C. Code*, 1924, Sec. 798; *D. C. Code* 1929, Tit. 9, Sec. 12.



Examination of the decisions which define and illustrate the meaning of the term "deliberate", as that term is used in the District of Columbia Code and other statutes defining first degree murder, demonstrates that there was in this case abundant evidence from which the jury might properly find that the appellant acted with deliberation.

In *Aldridge v. United States*, 60 App. D. C. 45, 47 F. (2d) 407, it appeared that the defendant and his brother were observed burglarizing a drug store in Washington. The police were notified and apprehended the defendant a short distance from the drug store. The defendant was placed in the police car and driven back to the drug store, and as the car stopped at the store, the defendant shot the deceased, who was the police officer driving the car. The entire incident apparently consumed only a very few minutes, and on appeal it was urged by counsel for the defendant that the Court erred in refusing to withdraw from the consideration of the jury the question of defendant's guilt of first degree murder, on the theory that there was no evidence of premeditation or deliberation. The Court of Appeals held, however that—

Deliberation and premeditation may be instantaneous. Their existence is to be determined from the facts and circumstances in each case. It is a question, under a proper charge by the Court, for the jury to determine. The circumstances under which the present crime was committed all tend to es-

tablish the commission of the offense with deliberation and premeditation.

This case was reversed on other grounds in 283 U. S. 308.

In *Bowman v. United States*, 50 App. D. C. 90, 267 Fed. 648, the evidence showed that at the time of the homicide, the defendant and his friend, Esther Brown, were seated on the grass in Lord's Woods in Washington. Esther Brown, who was the only witness for the Government, testified she heard a noise in the leaves, and the defendant suggested it was—

probably chickens scratching in the leaves; she then heard the noise again, and by this time "Frank Bowman had gotten up and shot at the man, and the man fell, and by that time I jumped up and I seen the man." By that time he [defendant] had gotten up and shot the man once, and I looked around and seen it was a man, and he [defendant] was loading his gun, and he shot him two more times, and I hollered "Stop shooting the man!" and he [defendant] run and grabbed me, and asked me, "Was I going to tell it?" I says, "I haven't anything to do with it;" and he said, "If I thought you would tell it, I would shoot you, and leave you here, too." I said, "No; don't shoot me."

The deceased appears to have been a total stranger to the defendant, who chanced upon the defendant's tryst while strolling in the woods. At



the trial Mr. Chief Justice McCoy instructed the jury as follows:

Now, then, there is only one difference between murder in the second degree and murder in the first degree. All the other things, all the elements which I have stated to you, must exist in order that you may find a man guilty of murder in the second degree, must exist before you can find him guilty of murder in the first degree. But, added to that, there is the element of deliberate and premeditated malice; that is to say, the defendant, before he can be found guilty of murder in the first degree, must be shown beyond a reasonable doubt to have deliberated or premeditated upon the thing that presented itself to his mind, upon the condition that presented itself to his mind, "shall I kill or shall I not kill?" and having deliberated upon that question, chose to kill. That would be deliberation and premeditation.

Now, of course, you must find that it exists in this case beyond a reasonable doubt and from the facts in this case, the evidence in the case, as it has been presented to you. It does not mean that he must actually, honestly have deliberated at that particular time alone when this act was done. It may mean that he prepared to do this act without lawful right. Of course, if he deliberated upon it for some time, and continued in that frame of mind down to the time the killing was done, why, that is deliberate and pre-

meditated malice aforethought. The law does not say how long the deliberation has to be. On the other hand, it may be a long time, three or four days, or any time you please, or it may be a shorter time. All that the law says is that there has to be some deliberation. Of course, everything in human affairs takes place within the limits of time, so there must be enough time for the man to make his choice; but, if he makes that choice, in the shortest time when the man could make it, or the longest time that is necessary for a man to take in considering the circumstances of the case, and what operated in his mind—then there is deliberation and, if you find all those things beyond a reasonable doubt, then your verdict in this case should be guilty as indicted, and the indictment charges murder in the first degree (Records & Briefs Ct. Apps. D. C. Vol. 288).

The conviction was affirmed.

It is difficult to imagine more rapid deliberation than that which occurred in the Bowman case.

Many instructive decisions upon this subject have been rendered by the Court of Appeals of New York under a statute which, like the District of Columbia Code, makes deliberation an element of first degree murder.

In *People v. Majone*, 91 New York, 211, the evidence tended to show that the prisoner, an Italian, married a young Italian girl and they lived for a time with her parents. He did not live harmoni-



ously with his wife and had some difficulty with his mother-in-law. On the occasion of the homicide, he entered the room where his wife and her parents were, for the purpose of procuring a certain paper belonging to a friend of his. The wife was hanging clothes out of a window, and he asked her to go into a bedroom and bring out a box containing the paper. She replied that she was hanging out clothes and that he should go and get the box for himself. He took her by the arm and led her into the bedroom saying, "Will you go or will I go?" Immediately thereafter he shot and killed her, came out with the revolver in his hand with which the shooting had been done, and put the weapon to the head of his mother-in-law and fired and killed her. The indictment was for the second killing. There was no altercation on the occasion of the shooting and no provocation then except the refusal of his wife to comply with his request. It did not appear that his mother-in-law had any conversation whatever with him. The pistol belonged to him and had been for some time in his possession. In affirming the verdict and judgment of guilty of murder in the first degree, the Court of Appeals said:

The defendant was convicted of murder in the first degree, and that crime is defined by the statute to be the intentional killing of a human being without the authority of law, when such killing is "perpetrated from a deliberate and premeditated design to effect the death of the person killed or of any

human being.” The main contention of the defendant’s counsel in his argument before us was that the evidence does not justify the finding that the killing in this case was deliberate and premeditated. Under the statute, there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. And when the time is sufficient for this, it matters not how brief it is. The human mind acts with celerity which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case.

In *People v. Ferraro*, 161 New York 365, 55 N. E. 931, it appeared that shortly after an exchange of unfriendly words between the defendant and the deceased, the defendant cut the throat of the deceased with a razor. At the trial the defendant contended that there was no evidence for the consideration of the jury on the question of murder in the first degree. In affirming the conviction of murder in the first degree, the Court of Appeals said:

In this case the time for reflection may have been very short, but, according to the



evidence, it was not necessarily so. We cannot look into the defendant's mind and see when he formed the intention to kill. A short time before the act of killing unfriendly words had passed between him and the deceased. When Musacchio left the yard the defendant followed him out, and, without uttering a word, drew a razor from an inside pocket of his coat or vest, opened it, put his left hand on the shoulder of the deceased, and, with the razor in his right hand, inflicted the fatal wound, which he followed up by two more, neither of which, however, were of a serious character. The defendant's intention must be inferred from his acts, and it was a fair inference that he drew his razor for the purpose of killing the deceased. Why he carried a razor does not appear. The nature of the weapon, the manner of its use and the place where the blow was struck, are facts of the highest importance. *The jury might properly have found that the thought of taking life was conceived and the intention to kill formed not later than when he put his hand in his pocket. The interval between that act and the infliction of the fatal wound, though very short, was sufficient for reflection, which implies deliberation.* There was no apparent cause for excitement or anger, nor anything to prevent cool reflection. Not an act had been done, nor a word spoken, by either of the parties with reference to the other, for some minutes, probably not for an hour before the fatal stroke. There was nothing to in-



dicade hot blood or unreflecting action. If there had been provocation, there was time to cool off. Hence, the jury could further find that, after the formation of a settled purpose to kill, there was time for second thought and a change of purpose before the act of killing. The design was not formed and executed at the same time, as there was an interval between, short but appreciable, and "sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill." [Italics ours.]

In *People v. Chiaro*, 200 New York 316, 93 N. E. 931, the evidence showed that the homicide occurred in the yard of an industrial plant. The defendant was employed by the company as a laborer, and the deceased was a teamster and watchman. On the occasion of the killing, the defendant exchanged unfriendly words with one Marsh, who was also a watchman, and Marsh thereupon took the defendant by the shoulder and ejected him from the yard. The defendant walked through and beyond the yard gateway for 10 or 15 feet, and Marsh walked back into the yard for about 30 feet. The defendant thereupon ran back to Marsh pointing a gun at him, and when the deceased, Keene, who was standing nearby told the defendant to put up his gun, the defendant pointed the gun at Keene. The defendant thereupon put up his pistol and the three men started to walk to the gateway. When they reached the gateway the de-



fendant shot Marsh, and when Keene asked him why he had done that, he shot and killed Keene. The interval between the shooting of Marsh and the shooting of Keene was two seconds. The evidence also showed that until this occasion, the relations between the parties had been uniformly and thoroughly friendly. On appeal from a conviction of murder in the first degree, the defendant's counsel argued that the trial court erred in submitting to the jury the question whether the defendant was guilty of murder in the first degree, since there was no evidence that the defendant shot Keene with a deliberate and premeditated design to effect his death. The Court of Appeals said, however:

We cannot reach that conclusion. The fact that the defendant, when at the point of ten or fifteen feet without the gate, turned about and ran toward Marsh, taking the pistol from his pocket at some instant after Marsh at the gateway had turned his back upon him, is evidence that the defendant had formed and held the design to use the pistol.

In *Daughdrill v. State*, 113 Ala. 7, 21 So. 378, the defendant was convicted of murder in the first degree. In affirming the conviction, the Supreme Court of Alabama said:

The evidence tended to show that defendant and deceased were entire strangers to each other. Deceased was engaged in con-

versation with the proprietor of the saloon in which the homicide occurred, when defendant approached and interrupted them. Deceased said he and the proprietor were talking on business, and did not want to be interrupted. He told defendant to go away and let them alone. Upon this the defendant applied a very opprobrious epithet to the deceased. The latter said he would not or could not take that. Defendant said you will have to that or worse, and stepped back a few feet. Deceased advanced somewhat toward the defendant, with one arm held up in front of him and the other by his side. Thereupon defendant drew a pistol and shot deceased through the body. It seems that deceased had ceased to advance when the shot was fired. He had no arms, nor made any demonstration as if to draw or use a weapon. From this summary of the case an appreciation of the sudden and unanticipated character of the rencountre and the rapidity of the succession of events, culminating in the fatal shot, may be had. The whole occurrence occupied only a few moments of time. Notwithstanding the spontaneity, so to say, of the difficulty, and the rapidity of action with which it progressed, it is, of course, clear that there was quite sufficient time, while it was passing, for every mental condition of murder in the first degree to have found lodgment in the mind of the slayer and co-existed there at the time the shot was fired.

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Now, in common parlance, the act of the defendant was sudden and rash whether it was committed with or without the formed design essential to murder in that degree, and the jury might have believed that it was deliberate and premeditated in the sense of the law, and yet have found that it was, in a sense, sudden and rash.

*Commonwealth v. Buccieri*, 153 Penn. 535, 26 Atl. 228, involved a conviction of murder in the first degree. The evidence showed that the defendant had been a patient in a hospital where the deceased was a nurse. It did not appear that there had been any trouble between them until the very moment of the homicide. The evidence showed, however, that when the deceased entered the room where the defendant was and placed a glass of milk at his bedside, he borrowed a penknife, had the owner open the blade for him, and then started in pursuit of the deceased as she was leaving the room and gave her three deep stabs in different parts of the body. The whole time that elapsed between the first indication of the prisoner's purpose and the giving of the fatal wounds was probably not longer than between 10 and 20 seconds. In affirming a conviction of murder in the first degree, the Court held that sufficient time for deliberation had been shown. The Court said:

There can be no purpose in the mind such as this one, which is not the product of deliberation and premeditation; the fact of the one necessarily presupposes the exist-

ence of the others. Where a cruel and deadly blow has been struck, and no precedent conduct significant of an intent to strike has been shown, it is interesting, profitable perhaps, to consider the processes of thought leading to the act and to discuss the rapidity of the mind's operations in reaching conclusions, in the hope of determining whether it was prompted by a sudden or rash impulse or was the accomplishment of a fully formed purpose. But when the final act has been preceded by a number of others, following each other in quick succession, but all in regular order, all pointing irresistibly to the purpose, it is idle to waste words in discussing what length of time is essential to deliberation and premeditation in framing in the mind the purpose; the fact of the purpose being shown, the time necessary for deliberation and premeditation, whether long or short, must have passed, just as certainly as the existence of a grain of corn demonstrates that there has been the time necessary to its growth.

In the instant case it was shown that after an exchange of unfriendly words with the deceased, the defendant paused to speak to a group of his friends who were standing on the street. The deceased walked up the street 4 or 5 doors and stopped to whistle for a friend who lived in the house by which the deceased was standing. At this the defendant handed to one of his friends two cans of beer which



he was carrying, and then walked or ran the 50 or 75 feet between him and the deceased, and shot at the deceased twice, the second shot being fired as the deceased fled. After shooting the deceased, the defendant fired a shot at a colored girl who had been standing with the deceased. The evidence showed that the defendant and the deceased were strangers to each other, and that the incident which culminated in the homicide consumed between 5 and 15 minutes.

Applying to the facts of the instant case the decisions which have been discussed, it seems clear that there was evidence from which the jury could reasonably find that Bostic acted with deliberation.

The charge of the trial court upon this subject, which appears at pages 28 and 29 of the Record, was extremely fair, lucid, and accurate. The court told the jury:

Then, he must also have acted with premeditation. "Premeditation" is simply the formation of the design, the intention to kill. I am speaking, now, of murder in the first degree. Did there spring into his mind the intention to kill Tuckson? Did he form that design? It does not necessarily involve any particular length of time within which to form such a design. It may be as quick as thought itself, and, as you know, action may follow thought so instantly that we consider all as one thing. The thought and the action seem to go together, and that is all that is necessary. If he did so form an intention

or design to kill, then he did premeditate, for "premeditation" is a designing to kill. That, of course, is not enough, because you will recall that the definition of murder in the first degree also requires that the fatal blow shall be struck deliberately. That is a very crucial term in the definition, and is a very vital question for you to consider, in determining whether or not Bostic is guilty of murder in the first degree; for, if he did form the design to kill, there must have elapsed, between the formation of that design and the pulling of the trigger, which sent the fatal bullet into the body of Tuckson, a period within which he, Bostic, did deliberate upon the thought or design to kill.

And what is "deliberation"? Deliberation is consideration of an idea, of a design. It is the turning of that design over in one's mind, reflecting upon it, giving it second thought, giving it consideration. Now, did he do that? Did he form a design to kill, and did he follow it up with deliberation, as I have just explained that term to you? If he did, and, after such deliberation, there followed in his mind, by reason thereof, a fixed and determined purpose to carry out a preconceived design to kill, and he shot the fatal bullet, by reason of such fixed and determined purpose, then he would be guilty of murder in the first degree. Did he deliberate, as I have explained that term to you? There must have been an appreciable period of time elapse between the formation of the design to kill and the actual execution



of that design, within which there was deliberation; for, to give consideration to a design necessarily involves some time, some appreciable period, within which it is considered and reflected upon. And so the question is, here, in a case of this sort, where the whole episode took only, from the testimony of witnesses, somewhere between five and fifteen minutes, or perhaps ten minutes, whether there was, actually, this element of deliberation entering into the fatal shooting of Tuckson. If there was not, then Bostic, however brutal or unjustified the killing may have been, is not guilty of murder in the first degree, because murder in the first degree is not to depend upon the cruelty, or brutality, necessarily, of the form of killing, but upon this crucial element of deliberation. In other words, it depends upon a state of mind, a state of mind which involves thought and reflection.

If you have a reasonable doubt that Bostic did deliberate upon the killing of Tuckson, then, of course, you will give him the benefit of that doubt, in which event you will pass on from the consideration of murder in the first degree, to determine whether he is guilty of murder in the second degree.

## II

### THE COURT PROPERLY ADMITTED EVIDENCE OF THE APPELLANT'S PRIOR CONVICTION OF SIMPLE ASSAULT

On cross examination of the appellant the District Attorney developed that on April 23, 1936, he

was convicted of simple assault, for which he served sixty days in jail. This testimony was taken over the objection and exception of the appellant on the ground that such a conviction did not involve moral turpitude.

The *District of Columbia Code* provides:

No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, whether upon the cross examination of the witness or by evidence aliunde \* \* \* (*D. C. Code*, 1929, Title 9, Sec. 12; *D. C. Code* 1924, Sec. 1067).

The appellant contends that the "crimes" which may be given in evidence under this statute are only those involving moral turpitude.

It is true that under similar statutes there has been a conflict of decisions with regard to the type of crime which may be proven to affect the credibility of a witness. See *Neal v. United States*, 1 F. (2) 637, 639 (C. C. A. 8th). It is generally held, however, that proof of a conviction of a witness of any crime, regardless of grade, may be shown. *Neal v. United States*, supra. With respect to the instant statute, moreover, it would seem unreasonable to hold that Congress intended to limit the meaning of the word "crime"; in other words, there seems to be no reason to believe that the statute does not mean precisely what it says. Cer-



tainly the practical application of the statute would become extremely difficult, if not impossible, if the propriety of cross examination were to depend upon the nebulous and metaphysical concept of moral turpitude. It would seem, on the other hand, that by the enactment of the statute, Congress must have intended to lay down a simple and workable rule, and to leave to the jury in each case the determination of the weight of the particular conviction involved. This analysis of the statute is supported by many cases, both in this District and elsewhere.

In *Murray v. United States*, 53 App. D. C. 119, 288 F. 1008, defendant was convicted of manslaughter. On appeal this Honorable Court said:

Error is alleged because the government was permitted, under defendant's objection and exception, to inquire in cross-examination of defendant if he had not been convicted of some five misdemeanors, one in the year 1908, two in 1909, and two in 1911, all of which defendant admitted, but said he had not been in any trouble since 1911. Section 1067 of the District Code provides: "No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, \* \* \* but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde. \* \* \*"

It is argued that this statute—

“does no more, and was not meant to do more, than to remove the common-law disability which attached to witnesses generally who had been convicted of felonies.”

It is unnecessary to enter upon a review of the numerous cited authorities, which are not altogether in harmony, but sufficient to say that there is no ambiguity in the section, and the defendant, having become a witness in his own behalf, comes within its provisions. The fact of former convictions of crime were properly shown to affect his credit.

The claim that the word “crime”, as used in the section, refers to felonies only, does not impress us, because, had Congress so intended, it were easy to so state, and also because the word “crime”, as commonly understood, includes both felonies and misdemeanors. *Bouvier's Law Dictionary*, vol. 1, p. 729; *Standard Dictionary*; 16 *Corpus Juris*, p. 51; *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; *State v. Henson*, 66 N. J. Law, 601, 50 Atl. 468, 616; *Commonwealth v. Hall*, 4 Allen (Mass.) 305.

*Thompson v. United States*, 30 App. D. C. 352, 12 Ann. Cas. 1004, much relied on by defendant, is not in conflict with this view, because as the court pointed out, the so-called conviction shown there was not such.

The remoteness of the convictions affected only the weight to be given to them as evi-



dence, and was for the jury, who would in connection therewith consider other relevant testimony, including defendant's statement that since 1911 he had not been in any trouble.

Examination of the record in the Murray case on file in this Court reveals that one of the questions to which Murray objected was "Murray, on August 2, 1908, were you not convicted of assault upon John King and sentenced to ninety days in jail?"; and another question was, "On August 11, 1909, were you convicted of an assault upon Harry Johnston and sentenced to fifteen days in jail?" *Murray v. United States*, No. 3800, Record, p. 21. It seems clear, therefore, that the Murray case really determines the question raised here.

In *Quigley v. Turner*, 150 Mass. 108, 22 N. E. 586, the trial court admitted evidence that the defendant who had testified in his own behalf had been convicted of an assault. This evidence was admitted, over the exception of the defendant, for the sole purpose of affecting his credibility. On appeal the court said:

The Pub. Sts., c. 169, sec. 19, provide that "the conviction of a witness of a crime may be shown, to affect his credibility", and it is urged that this signifies that the crime shall be of such a nature as in itself to affect the credibility of a witness, and that the mere fact of a conviction for an assault could not be of this character. The language of the statute is explicit and general,

and permits the conviction of any crime to be given in evidence, leaving to the jury to judge how far the credibility of a witness may be affected thereby. Undoubtedly a conviction for some offences should affect this but slightly, perhaps not at all. Previous to the St. of 1852, c. 312, sec. 60, the law in regard to the impeachment of witnesses by the evidence of convictions of other offences had become very unsatisfactory, as pointed out by Chief Justice Chapman in *Commonwealth v. Hall*, 4 Allen, 305. Artificial distinctions had existed by which, in some instances, evidence of convictions for offences which bore very strongly on the credibility of a witness was not received, while in others evidence was received of a conviction which could only bear very slightly on this question. It was deemed wiser, therefore, that any conviction of a crime should be received, and that such weight should be attributed to it on this question as, in the judgment of the tribunal before which the witness appeared, it deserved. The statute puts all convictions of crime on the same footing—those which would formerly have excluded a witness, those which have heretofore gone to credibility, and those which formerly would not have been admissible at all. *Gertz v. Fitchburg Railroad*, 137 Mass. 77, 79. The evidence of the conviction of the defendant, who was also a witness, was therefore properly admitted for this limited purpose.



In *Thompson v. Bankers Mutual Casualty Insurance Company*, 128 Minn. 474, 151 N. W. 180, the Court said:

Plaintiff was permitted to show by way of cross-examination of one of defendant's witnesses that the witness had been convicted upon his own confession of the crime of assault, and to show the nature of the assault, that is, that it consisted in attempting to kiss a married woman. The admission of this evidence is assigned as error. The statute permits this form of impeaching testimony. It provides that "every person convicted of crime shall be a competent witness \* \* \* but his conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination." G. S. 1913, sec. 8504. The statute applies to all crimes. It bars none, whether felonies or petty misdemeanors, and whether the crime was or was not a crime at common law. In determining whether proof of conviction is admissible there is no room for inquiry as to whether or not the crime is one which affects the weight of the witness' testimony.

In *State v. Henson*, 66 N. J. Law 601, 50 Atl. 468, the State showed on the cross examination of the defendant in a murder case that the defendant had been convicted of assault and battery. It was held on appeal that this cross-examination was proper, since the statute provided that a conviction of

“crime” might be shown for the purpose of affecting the credit of a witness. The court said:

There being no specification or designation of the crime to which this inquiry may be directed, the accepted rules of interpretation will be disregarded if proof of the conviction of any crime is withheld from the jury.

In *Koch v. State*, 126 Wis. 470, 475, 106 N. W. 531, the court ruled that a statute of the type under consideration included all crimes whether infamous or not. The court said, however, that “at common law it was only convictions of crimes which rendered the person infamous that excluded him from being a witness and it was regarded a point of no small difficulty to determine precisely the crime which rendered the perpetrator thus infamous.”

The appellant contends that the case of *Clawans v. District of Columbia*, 61 App. D. C. 298, 62 F. (2) 383, holds “that the only misdemeanors admissible to affect the credibility of a witness are those which involve moral corruption or moral turpitude.” The *Clawans* case, however, decided only that a violation of a *municipal ordinance* could not be shown to affect credibility.

It should be noted, moreover, that in submitting to the jury the evidence of Bostic’s prior conviction, the trial court carefully limited its effect. The Court said:

There is evidence here of the fact that Bostic was convicted of an assault, not long



ago, for which he served a jail sentence. That is only admitted, as bearing upon his credibility as a witness, here, upon the stand. If he had not taken the stand, there would have been no proof of that. It is not proof, in any sense, to support the charge, here, that he murdered Tuckson. It was only given to you as reflecting upon the character of the man, for what you think it may be worth. You may not consider that it has any bearing, to determine the truth or falsity of his statements, or you may. In your own good judgment, you will determine that.

#### CONCLUSION

In conclusion it is respectfully submitted that the evidence supports the verdict of the jury, that the appellant was accorded a fair trial, and that the verdict and judgment should therefore be affirmed.

Respectfully submitted.

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